133-198

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~113.~~ 1022

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, IN THE STATE OF KANSAS, PLAINTIFF IN ERROR,

vs.

CHARLES EDWARD LEWIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS

FILED OCTOBER 22, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1413.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, IN THE STATE OF KANSAS, PLAINTIFF IN ERROR,

vs.

CHARLES EDWARD LEWIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 4, 1888.

a In the Supreme Court of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas, Plaintiff in Error,

vs.

CHARLES EDWARD LEWIS, Defendant in Error.

And now comes said plaintiff in error and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that upon the facts agreed and the fact found set out in the bill of exceptions of said plaintiff in error the said circuit court ought not to have rendered against said plaintiff in error any judgment whatever on account of any coupons from either series of said bonds, but should have rendered judgment against said defendant in error and in favor of the plaintiff in error for costs, and should have rendered no judgment other than that; and in this, to wit, that upon the said facts the said circuit court should have found that said defendant in error was not entitled to recover on any coupons from either series of said bonnds and ought not to have found that said defendant in error was entitled to recover on any of said coupons,
b as in fact the said court did.

And the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought; that said circuit — may be ordered to render judgment on said facts in favor of said plaintiff in error and against said defendant in error, and that said plaintiff in error may be restored to all things which it has lost by occasion of the said judgment.

G. C. CLEMENS,
Attorney for Plaintiff in Error.

1 *Petition.*

THE UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

In the Circuit Court of the United States for the District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas.

The plaintiff, who is a resident of the city of London, in the Kingdom of Great Britain, and a citizen of the Kingdom of Great Britain, complains of the defendant, a corporation duly organized under the laws of the State of Kansas and a citizen of the State of Kansas, and, for causes of action, says:

And, for first cause of action, plaintiff says that on the tenth day of March, 1874, at the city of Smallwood, in the county of Comanche and State of Kansas, the said defendant made and issued its certain bond, dated on said day at said place, whereby, for value received, it promised, ten years from date, to pay to —— —— or bearer one

thousand dollars, at the Fourth National Bank, in the city of New York, State of New York, with interest at the rate of ten per cent. per annum, payable semi-annually at said Fourth National Bank, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No.
1. A copy of said bond, except as to number, is hereto attached and made part hereof and marked Exhibit "A." That on the
2 seventh day of April, 1874, said bond was duly registered in the office of the auditor of state; that attached thereto was, among others, a certain coupon, bearing date on the day and at the place aforementioned, made by said county of Comanche, whereby it promised to pay to the bearer thereof fifty dollars, at said Fourth National Bank, on the first day of February, 1880, for the interest then and there to be due on said bond; which coupon is in words and figures as follows:

$50. STATE OF KANSAS. $50.

The County of Comanche will pay to the bearer, at the Fourth National Bank, in the city of New York, on the first day of February, 1880, fifty dollars for six months' interest due on bond No. 1 for $1,000.

ALEX. MILLS,
Chairman Board of Commissioners.
WM. ALLEN, *Co. Clerk.*

That before said coupon by its terms became due and payable the said bond, together with said coupon, came to and for value became the property of the plaintiff, who therefore became and has ever since been and still is the true and lawful owner and holder thereof; that when said coupon by its terms became due and payable the same was duly presented at the place of payment therein mentioned and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often applied to said defendant to pay the said coupon, but it has refused to do so, notwithstanding it is justly indebted thereon to the plaintiff in the full sum of five dollars, which he claims, with interest from the first day of February, 1880.

(Then follow 144 additional counts, each precisely the same
3 as the foregoing count in every respect save as to the number of the count, the number of the bond, and the date of the maturity of the coupon, each count referring to Exhibit "A," as in the above.)

And for his hundred & forty-sixth cause of action plaintiff says that on the tenth day of March, 1874, at the city of Smallwood, in the county of Comanche and State of Kansas, the said defendant made and issued its certain bond, dated on said day at said place, whereby, for value received, it promised ten years from date to pay to —— —— or bearer one thousand dollars, at the Fourth National Bank, in the city of New York, State of New York, with interest at

the rate of ten per cent. per annum, payable semi-annually at said Fourth National Bank, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No. 1. A copy of said bond, except as to number, is hereto attached and made part hereof and marked Exhibit "B." That on the seventh day of April, 1874, said bond was duly registered in the office of the auditor of state; that attached thereto was, among others, a certain coupon, bearing date on the day and at the place aforementioned, made by said county of Comanche, whereby it promised to pay to the bearer thereof fifty dollars, at said Fourth National Bank, on the first day of February, 1880, for the interest then and there to be due on said bond; which coupon is in the words and figures as follows:

$50. STATE OF KANSAS. $50.

The County of Comanche will pay to the bearer, at the Fourth National Bank, in the city of New York, on the first day of February, 1880, fifty dollars for six months' interest due on bond No. 1 for $1,000.

4 ALEX. MILLS,
Chairman Board of Commissioners.
WM. ALLEN, *Co. Clerk.*

That before said coupon by its terms became due and payable the said bond, together with said coupon, came to and for value became the property of the plaintiff, who therefore became and has ever since been and still is the true and lawful owner and holder thereof; that when said coupon by its terms became due and payable the same was duly presented at the place of payment therein mentioned and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often applied to said defendant to pay the said coupon, but it has refused to do so, notwithstanding it is justly indebted thereon to the plaintiff in the full sum of fifty dollars, which he claims, with interest from the first day of February, 1880.

(Then follow 115 counts, each precisely the same as the foregoing count save as to the number of the count, the number of the bond, and the date of maturity of the coupon, each count referring to Exhibit "B," as in the above.)

And for his two hundred and sixty-first cause of action plaintiff says that on the tenth day of March, 1874, at the city of Smallwood, in the county of Comanche and State of Kansas, the said defendant made and issued its certain bond, dated on said day at said place, whereby, for value received, it promised ten years from date to pay to —— —— or bearer five hundred dollars, at the Fourth National Bank, in city of New York, State of New York, with interest at the rate of ten per cent. per annum, payable semi-annually at said Fourth
5 National Bank, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like char-

acter, was marked No. 1. A copy of said bond, except as to number, is hereto attached and made part hereof and marked Exhibit "C." That on the seventh day of April, 1874, said bond was duly registered in the office of the auditor of state; that attached thereto was, among others, a certain coupon, bearing date on the day and at the place aforementioned, made by said county of Comanche, whereby it promised to pay to the bearer thereof twenty-five dollars, at said Fourth National Bank on the first day of February, 1880, for the interest then and there to be due on said bond; which coupon is in words and figures as follows:

$25. STATE OF KANSAS. $25.

The County of Comanche will pay to the bearer, at the Fourth National Bank, in the city of New York, on the first day of February, 1880, twenty-five dollars for six months' interest due on bond No. 1 for $500.

ALEX. MILLS,
Chairman Board of Commissioners.
WM. ALLEN, *Co. Clerk.*

That before said coupon by its terms became due and payable the said bond, together with said coupon, came to and for value became the property of the plaintiff, who therefore became and has ever since been and still is the true and lawful owner and holder thereof; that when said coupon by its terms became due and payable the same was duly presented at the place of payment therein mentioned and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often applied to said defendant to pay the said coupon, but it has refused to do so, notwithstanding it is justly indebted
6 thereon to the plaintiff in the full sum of twenty-five dollars, which he claims, with interest from the first day of February, 1880.

(Then follow 200 counts each precisely the same as the foregoing count save as to the number of the count, the number of the bond, and the date of the maturity of the coupon, each count referring to Exhibit "C," as in the above.)

Wherefore plaintiff prays judgment against said defendant for the sums of money hereinbefore mentioned and amounting in the aggregate to the sum of eighteen thousand ($18,000) dollars, together with interest thereon at the rate of seven per cent. per annum, as follows:

On $3,600.00 thereof from February 1st, 1880.
On $3,600.00 more thereof from August 1st, 1880.
On $3,600.00 more thereof from February 1st, 1881.
On $3,600.00 more thereof from August 1st, 1881.
On $3,600.00 more thereof from February 1st, 1882.
And for costs of suit.

WILLIAMS & DILLON,
Attorneys for Plaintiff.

In the Circuit Court of the United States for District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas, Defendant.

The clerk of the circuit court of the United States for the district of Kansas will issue a summons, under the seal of said court, returnable according to law, notifying said defendant that the plaintiff has commenced suit against it in said court by petition, wherein the sum claimed is eighteen thousand dollars, together with interest thereon at the rate of seven per cent. per annum, as follows:

7

On $3,600.00 thereof from February 1st, 1880.
On $3,600.00 more thereof from August 1st, 1880.
On $3,600.00 more thereof from February 1st, 1881.
On $3,600.00 more thereof from August 1st, 1881.
On $3,600.00 more thereof from February 1st, 1882.

WILLIAMS & DILLON,
Attorneys for Plaintiff.

"A."

UNITED STATES OF AMERICA.

Bridge Bond of the County of Comanche. Ad Astra per Aspera.

No. 1. $1,000.00.

Know all men by these presents that the County of Comanche acknowledges itself to owe and promises to pay to —— —— or bearer one thousand dollars, lawful money of the United States of America, on the 1st day of February, A. D. 1884, at the Fourth National Bank, in the city of New York, with interest at the rate of ten per cent. per annum, payable semi-annually on the 1st days of February & August of each year, on the surrender of the annexed coupons as they become due, at said Fourth National Bank, in the city of New York.

One

This bond is executed and issued in pursuance of and in accordance with an act of the Legislature of the State of Kansas, entitled

Thousand Dollars.

"An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power or other works

8

of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2, 1872, and also in accordance with the vote of a majority of the qualified electors of said county of Comanche, at a special election duly and regularly held therefor on the 31st day of January, 1884.

In testimony whereof the board of county commissioners of said county of Comanche have caused this bond to be signed by the chairman of said board and by the clerk of the county and to be sealed with the seal of said county and to be registered, as required by law, at the city of Smallwood, county of Comanche, this March 16th, A. D. 1874.

ALEX. MILLS,
Chairman of Board Co. Comm'rs.

[Seal County Clerk Comanche Co., K's.]

Attest: WM. ALLEN,
County Clerk.

I, D. W. Wilder, auditor of State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the Legislature entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvements, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2nd, 1872.

Witness my hand & official seal this 7th day of April, 1874.

[Seal Auditor of State Kansas. Jan., 1861.]

D. W. WILDER,
Auditor of State of Kansas.

9 "B."

UNITED STATES OF AMERICA.

Court-House Bond of the County of Comanche. Ad Astra per Aspera.

No. 1. $1,000.00.

Know all men by these presents that the County of Comanche acknowledges itself to owe and promises to pay to —— —— or bearer one thousand dollars, lawful money of the United States of America, on the 1st day of February, A. D. 1884, at the Fourth National Bank, in the city of New York, with interest at the rate of ten per cent. per annum, payable semi-annually on the 1st days of February and August of each year, on the surrender of the annexed coupons as they become due, at said Fourth National Bank, in the city of New York. This bond is executed and issued for the purpose of erecting county buildings in pursuance of and in accordance with

One

an act of the Legislature of the State of Kansas entitled "An act relating to counties and county officers," approved February 29th, 1868,

Thousand Dollars.

and "An act to authorize counties, incorporated cities, and municipal

townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2d, 1872, and also in accordance with the vote of a majority of the qualified electors of said county of Comanche, at a special election duly and regularly held therefor on the 31st day of January, 1874.

In testimony whereof the board of county commissioners of the said county of Comanche have caused this bond to be signed by the chairman of said board and by the clerk of the county & to
10 be sealed with seal of said county and to be registered, as required by law, at the city of Smallwood, county of Comanche, this March 10th, A. D. 1874.

ALEX. MILLS,
Chairman of Board of Co. Commissioners.

[Seal County Clerk Comanche County.]

Attest: WM. ALLEN, *Co. Clerk.*

I, D. W. Wilder, auditor of State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the Legislature entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvement, & providing for the registration of such bonds, the registra- of other bonds, & the repealing of all laws in conflict therewith," approved March 2, 1872.

Witness my hand and official seal this 7th day of April, 1874.

[Seal Auditor of State of Kansas. Jan. 29, 1861.]

D. W. WILDER,
Auditor State of Kansas.

11 "C." UNITED STATES OF AMERICA. "C."

No. 1. $500.

Bond of the County of Comanche. Ad Astra per Aspera.

Know all men by these presents that the County of Comanche acknowledges itself to owe and promises to pay to —— —— or bearer five hundred dollars, lawful money of the United States of America, on the 1st day of February, A. D. 1884, at the Fourth National Bank, in the city of New York, with interest at the rate of ten per cent. per annum, payable semi-annually on the 1st days of February and August of each year, on the surrender of the annexed coupons as they become due, at said Fourth National Bank, in the city of New York.

This bond is executed and issued to meet the current expenses of the county in case of a deficit in the county revenue, in pursuance

of and in accordance with an act of the Legislature of the State of Kansas, entitled An act relating to counties and county officers, approved February 29th, 1868, and also in accordance with the vote of a majority of the qualified electors of said county of Comanche, at a special election duly and regularly held therefor on the 31st day of January, 1874.

In testimony whereof the board of county commissioners of the said county of Comanche have caused this bond to be signed by the chairman of the said board and by the clerk of the county and to be sealed with the seal of said county and to be registered, as required by law, at the city of Smallwood, county of Comanche, this March 10th, A. D. 1874.

ALEX. MILLS,
Chairman Board of Co. Comm'rs.

[Seal County Clerk Comanche County.]

Attest: WM. ALLEN, *Co. Clerk.*

12 I, D. W. Wilder, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the Legislature entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvement, and for providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2d, 1872.

Witness my hand and official seal this 7th day April, 1874.

[Seal Auditor of State of Kansas. Jan. 27th, 1861.]

D. W. WILDER,
Auditor State of Kansas.

Endorsed: No. 5114. Charles Edward Lewis *vs.* The Board of County Commissioners of the County of Comanche, in the State of Kansas. Petition & precipe. Filed June 30, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy.

13 Circuit Court of the United States of America, District of Kansas, *ss:*

The United States of America to the marshal of the district of Kansas, Greeting:

You are hereby commanded to notify The Board of County Commissioners of the County of Comanche, in the State of Kansas, that it has been sued by Charles Edward Lewis in the circuit court of the United States for the district of Kansas, and that unless it answer by the 30th day of July, A. D. 1885, the petition of the said Charles Edward Lewis against it filed in the clerk's office of the said court such petition will be taken as true and judgment rendered accordingly. You will make due return of this writ on the 10th day of July, A. D. 1885.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 30th day of June, A. D. 1885.

[SEAL.]

A. S. THOMAS, *Clerk*,
By FRANK H. HOLT, *Deputy*.

13*a* [Endorsed:] No. 5114. Circuit court of the United States, district of Kansas. Charles Edward Lewis *vs.* The Board of County Commissioners of the County of Comanche. Summons. Issued June 30, 1885; returnable July 10, 1885. Filed July 11, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy. Williams & Dillon, attorney- for plaintiff.

Suit brought for the recovery of money. Amount claimed, $18,000.00, with interest thereon at the rate of seven per cent. per annum, as follows:

On $3,600.00 thereof from February 1st, 1880.
On $3,600.00 more thereof from August 1st, 1880.
On $3,600.00 more thereof from February 1st, 1881.
On $3,600.00 more thereof from August 1st, 1881.
On $3,600.00 more thereof from February 1st, 1882.

A. S. THOMAS, *Clerk*,
By FRANK H. HOLT, *Deputy*.

WILLIAMS & DILLON,
Attorneys for Plaintiff.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ June the 30th, 1885. Served this writ at the county of Comanche, State and district of Kansas, on the 7th day of July, 1885, by delivering to Frank A. Holmes, clerk of the said county of Comanche, State of Kansas, and to A. D. Lee, one of the board of county commissioners of the said county of Comanche, State of Kansas, each a true and certified copy of this writ of — with all the endorsements thereon.

B. F. SIMPSON,
U. S. Marshal.

Service	4.00
Stage fare & livery	15.00
Hotel & bus	7.00
R. R.	13.50
	$39.50

14 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 1st day of June, A. D. 1885, proceedings were had and appear of record in words and figures following, to wit:

In Vacation, Thursday, July 30, 1885.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF COMANCHE COUNTY, in the State of Kansas, Defendant. } 5114.

AT CHAMBERS, *July* 30, *A. D.* 1885.

Upon application of said defendant it is hereby ordered that the time to answer in this action be, and it is hereby, extended fifteen days from this date.

C. G. FOSTER, *Judge.*

15 *Answer.*

In the Circuit Court of the United States for the District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas, Defendant. } No. 5114.

Common-law action.

And now comes said defendant, The Board of County Commissioners of the County of Comanche, and for answer to the petition of said plaintiff and to each and every of the divers causes of action therein alleged, says:

First. That on the 27th day of February, A. D. 1885, in pursuance of due proceedings to that end had, and by authority of the statute in such case provided, the Governor of the State of Kansas, by commission and proclamation under his hand and the great seal of the State of Kansas, duly appointed three certain citizens of the county of Comanche to act as county commissioners of said county and one certain citizen to act as county clerk thereof, and did duly declare the town of Coldwater, in said county, to be the temporary county-seat of said county; and the said four citizens so appointed duly qualified; and thereupon the said defendant became, and so is, — still remains an organized county, and as such a municipal corporation of the State of Kansas, but at all times prior to the 27th day of February, A. D. 1885, the said county of Comanche had been and remained an unorganized county of the State of Kansas, and the said defendant had never existed, either in law or in fact, at any time nor for any purpose whatever prior to the said 27th day of February, A. D. 1885, but was created and for the first time came into existence by the said organization of said county by the
16 Governor of the State of Kansas, as hereinafter stated.

Second. That there has never existed within said county of Comanche any city, town, village, nor hamlet known as the city of Smallwood.

Third. That said defendant never, at any place nor at any time nor for any purpose, made, executed, issued, delivered, nor in any

manner put in circulation any of the bonds, coupons, or written obligations described or declared upon in said petition or in the exhibits thereto, and never authorized the making, issue, delivery, nor putting in circulation of any of said bonds, coupons, or written obligations.

Fourth. That neither the said Alex. Mills nor the said Wm. Allen was ever at any time nor for any purpose any officer or agent of said defendant nor of said county of Comanche, and said Alex. Mills was never at any time a county commissioner nor the chairman of the board of county commissioners of said county, either in law or in fact, and said Wm. Allen was never at any time the county clerk of said county, either in law or in fact.

Fifth. That neither on the 7th day of April, A. D. 1874, nor at any other time, was either of said alleged bonds ever registered in the office of the auditor of the State of Kansas nor certified by said auditor as a bond issued by said defendant, and said auditor never at any time had any power nor authority to register nor certify any of the said alleged bonds.

Sixth. That the pretended seal alleged to have been affixed to or impressed upon said pretended bonds was not then and never has been the seal of said defendant nor of said county, and never was at any time nor for any purpose affixed to nor impressed upon any writing document, instrument, nor obligation by any officer nor agent of said defendant nor of said county.

Seventh. That said defendant denies each and every allegation in said petition contained.

G. C. CLEMENS,
Attorney for said Defendant.

17 UNITED STATES OF AMERICA, }
State of Kansas, Comanche County, } *ss:*

A. D. Lee, being by me first duly sworn, deposes and says that he is one of the county commissioners of the county of Comanche, in the State of Kansas, and that he believes the facts stated and the denials made in the foregoing answer to be true.

A. D. LEE.

Subscribed and sworn to before me this 8th day of August, A. D. 1885.

[SEAL.] J. A. PENNINGTON,
Notary Public of Comanche County, Kansas.

Commission expires March 16th, 1887.

Endorsed: No. 5114. Common-law action No. 5114. In the circuit court of the United States for the district of Kansas. Charles Edward Lewis, plaintiff, *vs.* The Board of County Commissioners of the County of Comanche, in the State of Kansas, defendant. Answer of defendant. Filed August 12, 1885. A. S. Thomas, clerk.

18 In the Circuit Court of the United States for the District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff
vs.
THE BOARD OF COUNTY COMMISSIONERS OF COMANCHE COUNTY, Kansas, Defendants.

Now comes the plaintiff and demurs to the answer of defendants herein, and for cause of demurrer says that the said answer does not contain facts sufficient to constitute a defense to said plaintiff's petition.

A. L. WILLIAMS,
Att'y for Plaintiff.

Endorsed: No. 5114. Charles Edward Lewis *vs.* Board of County Commissioners of Comanche County. Demurrer to answer. Filed Dec. 3, 1885. A. S. Thomas, clerk.

19 UNITED STATES OF AMERICA, } *ss*:
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 23rd day of November, A. D. 1885, proceedings were had and appear of record in words and figures following, to wit:

CHARLES EDWARD LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas. } 5114.

MONDAY, *Dec.* 5, 1885.

The defendant's demurrer to the plaintiff's answer herein came on to be heard and was argued by counsel, on consideration whereof the court doth overrule said demurrer and orders that the reply be refiled.

20 *Replication.*

In the Circuit Court of the United States for the District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, State of Kansas, Def't.

Now comes the plaintiff, by his attorneys, Williams & Dillon, & for reply to the answer of def't filed herein, denies each and every allegation therein contained.

WILLIAMS & DILLON,
Att'ys for Plaintiff.

Endorsed: No. 5114. Charles Edward Lewis *vs.* The Board of County Commissioners of the County of Comanche, State of Kansas. Replication. Filed Aug. 14, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

21 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 22nd day of November, A. D. 1886, proceedings were had and appear of record in words and figures following, to wit:

CHARLES EDWARD LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas. } 5114.

TUESDAY, *December 14th*, 1886.

Continued.

22 In U. S. Circuit Court, Dist. of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF COMANCHE COUNTY, State of Kansas, Def'ts. } No. 5114.

It is hereby agreed and consented to that the plaintiff may file an amended petition in above-entitled action, setting forth additional causes of action against said defendant, being coupons cut from same bonds in original petition, petition to be changed only by adding causes of action, not by new averments.

G. C. CLEMENS,
Att'y for Def'ts.

Endorsed: No. 5114. Charles Edward Lewis *vs.* The Board of County Commissioners of Comanche County. Agreement. Filed July 27, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy.

23 *Amended Petition.*

UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

In the Circuit Court of the United States for the District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas, Defendants.

Now comes the plaintiff, by his attorneys, Williams & Dillon, and, by consent of attorney for the defendant first had and obtained, ac-

cording to stipulation now on file in this action, and files this his amended petition against said defendants, and for further causes of action says:

And for his 461st cause of action plaintiff says that on the tenth day of March, 1874, at the city of Smallwood, in the county of Comanche and State of Kansas, the said defendant made and issued its certain bond, dated on said day, at said place, whereby, for value received, it promised ten years from date to pay to —— —— or bearer five hundred dollars, at the Fourth National Bank, in the city of New York, State of New York, with interest at the rate of ten per cent. per annum, payable semi-annually at said Fourth National Bank, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No. 2. A copy of said bond, except as to number, is hereto attached and made part hereof and marked Exhibit C.

That on the seventh day of April, 1874, said bond was duly registered in the office of the auditor of state; that attached thereto was, among others, a certain coupon bearing date on the day and
24 at the place aforementioned, made by said county of Comanche, whereby it promised to pay to the bearer thereof twenty-five dollars, at said Fourth National Bank, on the first day of August, 1882, for the interest then and there to be due on said bond; which coupon is in words and figures as follows:

$25. STATE OF KANSAS. $25.

The County of Comanche will pay to the bearer, at the Fourth National National Bank, in the city of New York, on the first day of Aug., 1882, twenty-five dollars for six months' interest due on bond No. 2 for $500.

ALEX. MILLS,
Chairman Board of Commissioners.
WM. ALLEN, *Co. Clerk.*

That before said coupon by its terms became due and payable the said bond, together with said coupon, came to and for value became the property of the plaintiff, who therefore became and has ever since been and still is the true and lawful owner and holder thereof; that when said coupon by its terms became due and payable the same was duly presented at the place of payment therein mentioned and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often applied to said defendant to pay the said coupon, but it has refused to do so, notwithstanding it is justly indebted thereon to the plaintiff in the full sum of twenty-five dollars, which he claims, with interest from the first day of Aug., 1882.

(Then follow 160 additional counts precisely the same as the above count save as to the number of the count, the number of the bond, and the date of maturity of the coupon, each count referring to Exhibit "C," as in the above.)

25 And for his 621st cause of action plaintiff says:

That on the tenth day of March, 1874, at the city of Smallwood, in the county of Comanche and State of Kansas, the said defendant made and issued its certain bond, dated on said day at said place, whereby, for value received, it promised, ten years from date, to pay to —— —— or bearer five hundred dollars, at the Fourth National Bank, in the city of New York, State of New York, with interest at the rate of ten per cent. per annum, payable semi-annually at said Fourth National Bank, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No. 1. A copy of said bond, except as to number, is hereto attached and made part hereof and marked Exhibit C. That on the seventh day of April, 1874, said bond was duly registered in the office of the auditor of state; that attached thereto was, among others, a certain coupon, bearing date on the day and at the place aforementioned, made by said county of Comanche, whereby it promised to pay to the bearer thereof twenty-five dollars, at said Fourth National Bank, on the first day of Feb., 1884, for the interest then and there to be due on said bond; which coupon is in words and figures as follows:

$25. STATE OF KANSAS. $25.

The County of Comanche will pay to the bearer, at the Fourth National Bank, in the city of New York, on the first day of Feb., 1884, twenty-five dollars, for six months' interest due on bond No. 1 for $500.

ALEX. MILLS,
Chairman Board of Commissioners.
WM. ALLEN, *Co. Clerk.*

That before said coupon by its terms became due and payable the said bond, together with said coupon, came to and for value became the property of the plaintiff, who therefore became
26 and has ever since been and still is the true and lawful owner and holder thereof; that when said coupon by its terms became due and payable the same was duly presented at the place of payment therein mentioned and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often applied to said defendant to pay the said coupon, but it has refused to do so, notwithstanding it is justly indebted thereon to the plaintiff in the full sum of twenty-five dollars, which he claims, with interest from the first day of Feb., 1884.

(Then follow 119 additional counts precisely the same as the foregoing count save as to the number of the count, the number of the bond, and the date of the maturity of the coupon, each count referring to Exhibit "B," as in the above.)

And for his 740th cause of action plaintiff says:

That on the tenth day of March, 1874, at the city of Smallwood, in the county of Comanche, and State of Kansas, the said defendant

made and issued its certain bond, dated on said day at said place, whereby, for value received, it promised ten years from date to pay to ——— or bearer one thousand dollars, at the Fourth National Bank, in the city of New York, State of New York, with interest at the rate of ten per cent. per annum, payable semi-annually at said Fourth National Bank, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No. 1. A copy of said bond, except as to number, is hereto attached and made part hereof and marked Exhibit A. That on the seventh day of April, 1874, said bond was duly registered in the office of the auditor of state; that attached thereto was, among
27 others, a certain coupon, bearing date on the day and at the place aforementioned, made by said county of Comanche, whereby it promised to pay to the bearer thereof fifty dollars, at said Fourth National Bank, on the first day of Aug., 1882, for the interest then and there to be due on said bond; which coupon is in words and figures as follows:

$50. STATE OF KANSAS. $50.

The County of Comanche will pay to the bearer, at the Fourth National Bank, in the city of New York, on the first day of Aug., 1882, fifty dollars for six months' interest due on bond No. 1 for $1,000.

ALEX. MILLS,
Chairman Board of Commissioners.
WM. ALLEN, *Co. Clerk.*

That before said coupon by its terms became due and payable the said bond, together with said coupon, came to and for value became the property of the plaintiff, who therefore became and has ever since been and still is the true and lawful owner and holder thereof; that when said coupon by its terms became due and payable the same was duly presented at the place of payment therein mentioned and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often applied to said defendant to pay the said coupon, but it has refused to do so, notwithstanding that it is justly indebted thereon to the plaintiff in the full sum of fifty dollars, which he claims, with interest from the first day of Aug., 1882.

(Then follow 92 additional counts, each precisely the same as the foregoing count save as to the number of the count, the number of the bond, and the date of maturity of the coupon, each count referring to Exhibit "A," as in the above.)

28 Wherefore plaintiff prays judgment against said defendant for the sums of money hereinbefore mentioned, amounting in the aggregate to the sum of fourteen thousand four hundred dollars, together with interest thereon at the rate of seven per cent. per annum, as follows:

On $1,000 from Aug. 1, '82.
" 1,000 " Feb. 1, '83.
" 1,000 " Aug. 1, '83.
" 1,000 " Feb. 1, '84.
" 1,150 " Aug. 1, '82.
" 1,150 " Feb. 1, '83.
" 1,150 " Aug. 1, '83.
" 1,150 " Feb. 1, '84.
" 1,450 " Aug. 1, '82.
" 1,450 " Feb. 1, '83.
" 1,450 " Aug. 1, '83.
" 1,450 " Feb. 1, '84.

WILLIAMS & DILLON,
Att'ys for Plaintiff.

Endorsed: No. 5114. Charles Edward Lewis *vs.* The Board of County Commissioners of the County of Comanche. Amended petition. Filed July 28, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy.

29 *Stipulation Waiving a Jury.*

In the Circuit Court of the United States for the District of Kansas.

CHARLES EDWARD LEWIS, Pl'tf,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF COMANCHE COUNTY, in the State of Kansas, Def'ts. } No. —.

The parties to this action hereby waive the intervention of a jury, and agree that this action may be tried by the court without the intervention of a jury.

WILLIAMS & DILLON &
ROSSINGTON, SMITH & DALLAS,
Attorneys for Plaintiff.
G. C. CLEMENS, *Attorney for Defendant.*

29*a* Endorsed: No. 5114. Charles Edward Lewis *vs.* The Board of County Commissioners of Comanche County. Stipulation waiving a jury. Filed Jan'y 12, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy.

30 *Opinion.*

In the Circuit Court of the Uunited States, District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE COMMISSIONERS OF THE COUNTY OF COMANCHE, Defendants.

FOSTER, *Judge:*

The plaintiff alleges in his petition that the defendant is a corporation duly organized under the laws of the State of Kansas, and on

or about March 10, 1874, made and issued its certain bonds, payable ten years after date, with ten per cent. interest, copies of which are attached; that said bonds had certain coupons attached for the interest to become due thereon, etc; that the plaintiff is the holder and owner of the coupons sued upon and praying judgment for something over thirty thousand dollars and interest. The defendant denies, generally, the allegations of the petition, and specially denies that Comanche county was duly organized at the time said bonds were issued; that, on the contrary, it was not organized until February, 1885, and denies that it ever authorized the making, issuing, or delivering of said bonds, etc.

The agreed facts as to its organization are, briefly, as follows: Prior to September 8, 1873, Comanche county was an unorganized county of this State. On September 8, 1873, a petition was presented to the Governor, purporting to be signed by over forty inhabitants and electors of said county, stating that there were six hundred inhabitants in said county, and asking that said county be organized and that A. Updegraff be appointed census-taker and G.
31 Brazell, R. Updegraff, and David Connell be appointed temporary county commissioners, and J. N. Lane, temporary county clerk, and that the temporary county-seat be located on section 33, town. 32 south, range 18 west, which petition was verified by three persons whose residence is not stated. On September 23rd a petition was presented to the Governor, purporting to be signed by over sixty citizens of said county, asking to have Smallwood made the temporary county-seat. On October 15 Governor Osborn appointed A. Updegraff census-taker of said county, who filed his oath of office and thereafter proceeded to take or pretend to take a census of said county and returned a list of six hundred inhabitants certified as correct, etc. On October 28th the Governor issued his proclamation, which is as follows:

"*Proclamation.*

Whereas a memorial signed by forty householders, residents of Comanche county, Kansas, and legal electors of the State whose signatures have been duly attested by the affidavit of three householders thereof, showing that said county had six hundred inhabitants, and praying for the organization of the same, said affiants setting forth that they had reason to believe and did believe said memorial; and

Whereas it appears from actual enumeration by the census returns, duly made and certified according to law by an officer regularly commissioned and qualified, that there are six hundred *bona fide* inhabitants of said county of Comanche:

Now, therefore, know ye that I, Thomas A. Osborn, Governor of the State of Kansas, by authority vested in me, have appointed and commissioned G. Brazell, A. J. Mowry, and David Connell, special county commissioners, and H. H. Moss, special county clerk of Comanche county, Kansas, who were the persons recommended for said offices in said memorial, and do hereby declare Smallwood the temporary county seat of said county.

32 In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State.

Done at Topeka this 28th day of October, 1873.

By the Governor:

[SEAL.] THOMAS A. OSBORN.

W. H. SMALLWOOD,
Secretary of State."

It will be observed that the Governor does not declare the county organized, but appoints special county commissioners and a special county clerk, and declares Smallwood the temporary county-seat. This was all he was authorized to do under the law.

The Legislature has absolute power over the organization of new counties. It may be designated just what proceedings are necessary to such organization. These proceedings may involve the exercise of ministerial and judicial powers, or it may be done by the direct act of the Legislature itself. The Governor's duties in this case are ministerial and must be in substantial conformity to law. No proclamation of the Governor declaring the county organized is required.

Act of March 1, 1872, page 243.
State *ex rel.* Com. Ford Co., 12 Kan., 445.

The Legislature, by the act of 1872, expressly points out the manner of the organization of new counties. After providing for the presentation of the memorial of forty householders, duly verified, the Governor appoints a census-taker, who shall take the census and make his return; and, if it appears by such return that there are six hundred *bona fide* inhabitants of said county, the Governor shall appoint and commission three persons, who shall be recommended in the memorial, to act as county commissioners, and
33 a proper person to act as county clerk, recommended in like manner, and shall designate the temporary county-seat, and from and after the qualification of the officers so appointed said county shall be deemed duly organized. There is no evidence in this case as to the officers having qualified; but, inasmuch as they entered upon the discharge of their respective duties and as it appears from the evidence they did perform some official acts, it may be presumed that they qualified as required by law.

From the agreed facts and the evidence produced it appears satisfactorily to my mind that the names in the memorial to the Governor for the organization of the county were not householders of Comanche county with possibly three or four exceptions. Nor were the persons who made affidavit thereto householders of said county, and said affidavit was false in fact; nor were there six hundred inhabitants, nor a twentieth part of that number, in said county at the time the pretended census was taken, nor was there any taxable property, real or personal, in said county. The whole proceeding to organize said county was a conspiracy, a sham, and a pretense, supported by fraud and perjury, and accomplished for the purpose of

making a *de facto* organization for the purpose of issuing bonds to enrich the conspirators and to get money from innocent parties and saddle a debt upon the future inhabitants of the county. When this had been accomplished the conspirators decamped from the county. So far as the records are concerned the organization appears to be (with some exceptions, such as the Governor not appointing for clerk and for one commissioner the persons named in the memorial) substantially in compliance with the statute. From these facts there can be no doubt but that the pretended organization was illegal, fraudulent, and void.

State *v.* Com'rs Ford Co., *supra.*
State *v.* Sillon, 21 Kan., 207.

34 A more difficult question, and one of much importance, remains to be determined. Was there such a *de facto* organization of the county as would impose upon it a legal liability to parties purchasing its bonds before due and without notice of fraud? The plaintiff in this case is such a holder of these bonds.

In this case there was legislative recognition of the organization of the county by attaching it to another county for judicial purposes. If there was a *de facto* organization, then under the decisions of the supreme court of Kansas legislative recognition of the organization, as before stated, would validate and make legal the organization.

Harper Co. case, 21 Kan., 210.
Pawnee county case, 12 Kan., 426.

And where the organization has been validated by legislative recognition the removal of the officers from the county or the failure to elect officers thereafter would not blot out or destroy the organization thus given life and validity.

Harper County case, *supra.*
Dill. Munc. Corp., vol. 1, sec. 110.

Had this organization been followed up and accepted by the inhabitants of the county thereafter and the machinery of the government kept in operation this case would be quite similar to the Harper and Pawnee cases, above quoted; but here there were no inhabitants, and the conspirators and officers, so called, all left for parts unknown soon after the bonds were issued, and for eleven years thereafter Comanche county, whether organized or unorganized, was unvexed by civil government. It had no officers, and no power to elect any, and there appeared no way to ever start the wheel of government but by a general or a special law for that purpose. So, in the year 1885, the territory of Comanche county
35 was organized in compliance with the law for the organization of unorganized counties. The Harper and Pawnee cases, before cited, clearly hold such an organization as Comanche county had when the bonds were issued a *de facto* organization, and that legislative recognition, such as was had in this case, makes a valid organization. The construction and effect of such legislation, as well as of the statutes for the organization of new counties by the

supreme court of this State, I apprehend will be accepted by the Federal courts, and I cannot see that a subsequent abandonment of the county government could disorganize the county and much less affect rights which had become vested before such abandonment. It therefore results as a conclusion of law that at the times these bonds were issued the defendant county had a *de facto* organization which had been made valid by legislative recognition, and it must be held in this case that such organization was thereafter valid and legal.

Passing now to the bonds in controversy, it appears that there were three classes of these bonds issued in Comanche county, as follows: $29,000 court-house, $23,000 bridge bonds, and $20,000 general-expense bonds.

The bonds issued for current expenses, under the act of 1868, contain a peculiar and somewhat ambiguous recital, which is as follows: "This bond is executed and issued to meet current expenses of the county in case of a deficit in the county revenue." The law evidently gave county commissioners the power to borrow money on the credit of the county for the purpose of meeting current expenses when a deficit actually existed—not to borrow money to meet a deficit in case such a contingency should happen in the future. Statutes of 1868, p. 256, sec. 16, subdiv. 4.

If this recital means what the words seem to imply, as it makes the purpose specific for which the bonds were issued, it would
36 hardly do to say that the further recital, "that it is in pursuance of the act of February 29th, 1868," would indicate a lawful purpose, but would rather indicate a misconstruction of the act by the commissioners issuing the bonds and a belief on their part that they had a right to borrow money under said act to have on hand in case a deficit should occur. Again, this recital indicates an unlawful purpose in this—the act of 1868 did not give the commissioners authority to issue bonds to meet current expenses of the county in any case. They are given authority to borrow money on the credit of the county, a sum sufficient, etc. Assuming that the words "upon the credit of the county" gave them authority to issue obligations of the county (Doty *vs.* Ellsbree, 11 Kan., 213), then these bonds would be for borrowed money, and the vote of the people should have been taken upon the question of borrowing money. Statutes of 1868, p. 257, Sec. 17.

So where a municipality was authorized to issue bonds for borrowed money with which to pay for stock in a railroad company it was held there was no authority for issuing the bonds direct to the railroad company for its stock.

Scipio *v.* Wright, 101 U. S., 665.

Also, where the law authorized bonds to be issued for money borrowed for the purpose of building a court-house it was held that the bonds could not be issued and sold in open market.

Lewis *vs.* Com's'rs Sherman Co., 1 McCrary, 377.

Where the recitals on the bond show that there was not due authority for its issue there can be no recovery.

McClure *vs.* T'p of Oxford, 94 U. S., 429.
Bates *v.* Winters, 97 U. S., 83.

Where the recitals are relied upon they must be clear and
37 unambiguous in order to estop the corporation.

School Dist. *v.* Strong, 106 U. S., 183.

It seems there was no law authorizing the registration of these general-expense bonds (Statutes 1872, p. 116, sec. 15), and therefore the registration cuts no figure in the case.

As the purchaser must take notice of the recitals on the bonds, it seems to me that the plaintiff is bound, either by the recitals or, at least, that there is no estoppel on the defendant, to show that there was no deficit in the revenue and that the bonds were illegally issued.

To say that there were any current expenses for this county to meet or that there was any revenue of said county under the agreed facts and evidence in this case seems a mockery of the terms of the statutes. The only possible county expense that can be imagined these conspirators incurred was the expense of printing these bonds and procuring a seal to stamp them with. It therefore follows that these current-expense bonds are invalid and illegal in whosever hands they may have come.

Another objection made to the whole of these bonds by the defendant is this: That inasmuch as it required a petition of one-fifth of the voters of the county asking for an election to vote the bonds, to be determined by the poll-books of the last general election, the holder of these bonds must necessarily take notice of the date of the organization of the county, and that there could have been no general election or poll-books from which to determine this question. It does not impress me that this objection is well taken. The object of the statute was to require a certain proportion of the voters to sign the petition, and if, as a matter of fact, one-fifth did sign the petition the purpose of the law had been accomplished, and in order to fix
an undisputed guide for the commissioners to determine that
38 question the poll-books of the last general election are made the test. But it seems to me that this is a question to be determined by the commissioners; and if it be true that the poll-books referred to are those of the general November election only, yet, so far as a *bona fide* holder is concerned, the decision of the commissioners on that point must be conclusive, and the county is estopped by the recitations on the bonds that they are issued in compliance with the statute.

Knox Co. *vs.* Aspenwall, 21 How., 539.
Roberts *v.* Bolles, 101 U. S., 119.
Rock Creek T'p *vs.* Strong, 96 U. S., 271.
Clay Co. *v.* Savings Society, 104 U. S., 579.
Lincoln *v.* Iron Co., 103 U. S., 412.
Block *v.* Comm's'rs, 99 U. S., 686.
Anthony *v.* Jasper Co., 101 U. S., 693.

Township of Colona *v.* Eaves, 92 U. S., 484
Douglass Co. *v.* Bolles, 94 U. S., 104.
County of Warren *v.* Marcy, 97 U. S., 96.

The defendant makes several objections to the court-house bonds. These bonds recite both the acts of 1868 and 1872. There is some authority for holding that county buildings are included in "works of internal improvement" under the latter act.

T'p of Burlington *v.* Beasley, 94 U. S., 310.

This question was rather incidentally referred to in said case and also in the case of Leavenworth Co. *v.* Miller, 7 Kan., 479, but the question was not really before the court in either case, and the latter case was decided before the act of 1872 was passed. On a careful reading of the acts of 1872 and 1868 I am impressed with the belief that it was not the intent of the Legislature to include county buildings under the head of "internal improvements" in the
39 act of 1872, and in the case of Osborn *v.* Co. of Adams, 106 U. S., 181, Mr. Justice Harlan, speaking for the Court, refers to this question as still in doubt. But whatever view may be taken of this question the recitals on these bonds are sufficient to bring them under the provisions of the act of 1868, which did authorize the issuing of bonds for county buildings, and therefore it answers no purpose to further discuss this point.

It results from the views above set forth that the plaintiff is entitled to recover upon the coupons clipped from the court-house bonds and bridge bonds and is not entitled to recover on the coupons clipped from the general-expense bonds.

Judgment will be entered accordingly.

Endorsed: No. 5114. Chas. E. Lewis *vs.* Com'rs of Comanche Co. Opinion. Filed May 31, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy.

40 UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 4th day of June, A. D. 1888, proceedings were had and appear of record in words and figures following, to wit:

CHARLES EDWARD LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas. } 5114.

MONDAY, *Aug.* 6, 1888.

Now comes the plaintiff herein, by Williams & Dillon and Rossington, Smith & Dallas, his attorneys, and also comes the defendant herein, by G. C. Clemens, its attorney, and thereupon this action came on for trial, and the parties hereto, by their attorneys, waive

a jury by written stipulation filed herein and submit the premises to the court.

And thereupon the court, having heard the evidence adduced and arguments of counsel, now find for the plaintiff and assess his damages against said defendant herein at the sum of $34,069.68.

And thereupon it is by the court here considered, ordered, and adjudged that said plaintiff herein, Charles Edward Lewis, have and recover of and from said defendant herein, The Board of County Commissioners of the County of Comanche, in the State of Kansas, the sum of thirty-four thousand sixty-nine dollars and sixty-eight cents and also his costs in this action expended.

To which ruling and judgment of the court the defendant duly excepts.

41 *Defendant's Bill of Exceptions.*

In the Circuit Court of the United States for the District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas, Defendant.

Be it remembered that the respective parties, by their attorneys of record, having filed with the clerk their stipulation in writing waiving a jury herein, the issues of fact were tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine of the Revised Statutes of the United States, upon an agreed statement of facts set forth in writing, which was submitted in open court and signed and filed, of which agreed statement the following is a true copy:

In the Circuit Court of the United States for the District of Kansas.

CHARLES EDWARD LEWIS, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas, Defendant.

It is hereby mutually agreed that this case shall be submitted to the court upon the following statement of facts, both parties
42 reserving the right to object to any of the facts herein stated as irrelevant, incompetent, and immaterial to the issue:

1. That prior to the 8th day of September, 1873, Comanche county was an existing unorganized county of the State of Kansas.

2. That on the 8th day of September, 1873, there was presented to Thomas A. Osborn, Governor of the State of Kansas, the following memorial:

His Excellency Governor Thomas A. Osborn.

SIR: We, the undersigned, being legal electors of the State and of the unorganized county of Comanche, hereby certify that there are 600 inhabitants in said county of Comanche, and we would most respectfully ask that said county be organized, and that A. Updegraff be appointed temporary county clerk; also that the temporary county-seat be located on section 33, township 32 south, range 18 west.

I. W. ANDERSON.
C. N. ALLEN.
O. C. WALKERS.
J. W. FREEMAN.
A. F. CANADA.
C. W. EMMONS.
R. T. WELCH.
R. E. BITMER.
L. E. TAYLOR.
S. L. TALMAGE.
C. M. SAWYER.
W. M. BARTON.
L. T. FRAKER.
S. HENSINGTON.
M. S. KIRKWOOD.
W. W. AMOS.
S. S. COLB.
C. MARSH.
ANTHONY COOPER.
S. ROCKWELL.
P. MEYERS.
DAVID BOYD.
O. N. PECKHAM.
D. W. EAVES.
FRANK TURNER.
JOSEPH WATSON.
W. G. THOMAS.
I. S. PINKERTON.
SAMUEL HONES.
—— SAMONS.
JOHN WYNCOOP.
W. W. MANNING.
CHARLES ANDERSON.
W. S. COONS.
MINOR SAMONS.
WILLIAM LAWRENCE.
GEORGE TUCKERMAN.
G. W. JOHNSON.
WILLIAM VANSKIVER.
W. W. HOLLINGHOUSE.
ROBERT SCHNECK.
THOMAS SMITH.
C. L. JAMES.

We do solemnly swear that the above names are genuine signatures of householders of the unorganized county of Comanche, State of Kansas, and that we have reason to and that we do believe that there are 600 inhabitants in said county, as stated in the above memorial.

W. M. WILLIAMS.
JOHN DEMUNN.
G. C. FARWELL.

Sworn to and subscribed before me, county clerk of Reno county, this 8th day of September, 1873.

A. C. KIES,
Clerk of Reno County.

43 3. That on the 23rd day of September, 1873, the following petition was also presented to the Governor:

"SMALLWOOD, COMANCHE COUNTY, KANSAS,
September 23rd, 1873.

To His Excellency Governor Osborn.

SIR: We, the undersigned, citizens of Comanche county, Kansas, understanding that a petition has been presented to you for the organization of our county, would respectfully ask that the town of Smallwood be made the county-seat of Comanche county for the following reasons: It is geographically near the center of the county and has plenty of timber and water near, is better located to command the trade of the county than any other town, and the heaviest settlement of Comanche county is in the vicinity of Smallwood. We therefore respectfully ask that you locate the county-seat here.

HENRY REBBINS.
JOHN BUSER.
E. BUSER.
G. W. COON.
M. S. COON.
M. E. COON.
C. E. COON.
A. COON.
FRANK MILES.
GEORGE MILES.
JAMES W. HALE.
JOHN BLAKE.
JOSEPH SAPHERS.
JOHN SCANTON.
EDGAR JONES.
JAMES JONES.
ALEXANDER MILLS.
CHARLEY MILLS.
H. VANTREESE.
J. MONTGOMERY.
DAVID ERTAB.
JAMES CALL, SR.

W. H. CALL.
S. THOMAS.
HENRY H. MOSS.
HENRY GILROY.
JAMES P. CALL.
HENRY H. WOOD.
M. P. MURPHY.
GEORGE KRIGGER.
A. J. MOWRY.
JAMES HOPKINS.
JAMES DUNLAP.
JOSEPH BROWN.
A. H. CARRIER.
H. DUNLAP.
G. W. EGLE.
C. C. KAIL.
ENOCH BARNETT.
AUSTIN S. DRAKE.
H. F. HART."

4. That on the 15th day of October, 1873, the Governor of the State appointed A. Updegraff census-taker for Comanche county.

5. That on the same day said Updegraff filed his oath of office in the following words, to wit:

"STATE OF KANSAS, } ss:
Barbour County, }

Before me, a justice of the peace in and for said county, comes A. Updegraff, duly commissioned by the Governor of Kansas to take the census in and for the county of Comanche, State of Kan-
44 sas, and, being duly sworn, deposes and says that he will support the Constitution of the United States and the State of Kansas and faithfully discharge the duties of the office of census-taker for the unorganized county of Comanche and true return make thereof, so help him God.

A. UPDEGRAFF.

Sworn to and subscribed before me, a justice of the peace in and for the county of Barbour, State of Kansas, this 15th day of October, A. D. 1873.

E. HAFFORD,
Justice of the Peace for Barbour County, Kansas."

"STATE OF KANSAS, } ss:
Barbour County, }

I, M. D. Houk, county clerk in and for said county of Barbour, hereby certify that E. Hafford was a duly qualified and acting justice of the peace in and for the county of Barbour, State of Kansas, on the 15th day of October, 1873.

In witness whereof I have hereunto set my hand — affixed my seal this 15th day of October, 1873.

M. D. HOUK,
County Clerk.

"After having sworn and subscribed to the above oath of office, I, A. Updegraff, census-taker of Comanche county, Kansas, then proceeded to make a true and correct enumeration of the *bona fide* inhabitants of said county of Comanche, of which the following list of names is a true and correct report thereof.

A. UPDEGRAFF,
Census-Taker for Comanche County, Kansas."

6. It is agreed that thereupon said Updegraff proceed- to take the said census and return a list of names, which he certified as true and correct, of over 600 inhabitants of said county.

7. That on the 28th day of October, 1873, Thomas A. Osborn, Governor of the State of Kansas, issued his proclamation in due form of law declaring the county of Comanche duly organized, which said proclamation was as follows:

"*Proclamation.*

Whereas a memorial signed by forty householders, residents of Comanche county, Kansas, and legal electors of the State, whose signatures have been duly attested by the affidavits of three householders thereof, showing that said county has six hundred inhabitants, and praying for the organization of the same, said affiants setting forth that they had reason to and did believe said memorial; and whereas it appears from actual enumeration, by census returns duly made and certified according to law by an officer regularly commissioned and qualified, that there are six hundred *bona fide* inhabitants in said county of Comanche:

Now, therefore, know ye that I, Thomas A. Osborn, Governor of the State of Kansas, by authority vested in me, have appointed and commissioned G. Brazel, A. J. Mowry, and David Connell special county commissioners and H. H. Moss special county clerk for Comanche county, Kansas, who were the persons recommended in said memorial; and do hereby declare Smallwood the temporary county-seat for said county.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of state. Done at Topeka, this 28th day of October, A. D. 1873.

THOMAS A. OSBORN.

By the Governor:
[SEAL.] W. H. SMALLWOOD,
Secretary of State."

8. Fither party may use any or all of the testimony, reports, documents, matters, things, or resolutions contained in the printed session laws, house or senate journals, or volumes of printed documents

of the State of Kansas, and any of the matters and things in the deposition of the plaintiff, Charles Edward Lewis, on file herein, taken in behalf of the plaintiff at the city of New York, relating to the questions or issues involved in this case, subject as aforesaid to objections as to relevancy of any of such testimony.

46 9. That the signatures to the bonds and coupons in suit are genuine.

10. That Alexander Mills, at the time he signed the bonds and coupons in suit, was acting as chairman of the board of county commissioners of Comanche county, at a place called Smallwood, within the geographical limits of Comanche county as it then existed.

11. That William Allen was at the same time acting as the clerk of the county of Comanche at a place called Smallwood, within the geographical limits of Comanche county, and as such was in possession of the seal attached to said bonds.

12. That a portion of the money arising from said bonds was used in the purchase from George W. Crane and Co., of Topeka, Kansas, of certain records, books, and supplies for the use of said county of Comanche and the said board of county commissioners of Comanche county.

13. That on the 7th day of April, 1874, said bonds in suit were duly registered in the office of the auditor of the State of Kansas.

14. That before the maturity of said bonds and coupons in suit they came to and for value became the property of plaintiff, who is an alien and citizen of the Kingdom of Great Britain, and that he was the *bona fida* holder without notice of any defense to said bonds and coupons.

15. That on January 13, 1874, one A. J. Mowry appeared and was sworn in as a member of the house of representatives of the State of Kansas, representing Comanche county, Kansas.

16. That on January 15th, 1874, the following resolution was offered in the house of representatives of the State of Kansas: "Resolved, That the speaker is hereby authorized and directed

47 to appoint a special committee of five members of the house, whose duties it shall be to investigate the settlement, organization and rights of representatives in this house of the counties of Harper, Comanche, and Ness."

17. That on January 20th, 1874, said resolution, on motion of A. H. Horton, was referred to the judiciary committe of the house of representatives of the State of Kansas.

18. That on January, 27th, 1874, the chairman of committee of judiciary of the house of representatives of the State of Kansas reported as follows: "The committee further report that from the official records it appears that the counties of Comanche, Harper, and Ness were regularly and properly organized, and that the committee are of the opinion that the question of the fraudulent organization of said counties and whether two hundred and fifty legal votes were cast in either of these counties at the last general election are matters of fact which your committee deem proper subjects of investigation upon evidence, and we therefore recommend the questions of the fraudulent organization of each of said counties, and as

to the number of legal votes cast in each of them at the last general election, be referred to the committee on elections, together with the petition and affidavits in relation to said county organizations and elections now in possession of your committee, and that said committee on elections examine said matters, take evidence in relation thereto, and report thereon to this house at the earliest possible day."

19. That on February 2, 1874, the said A. J. Mowry participated in the proceedings of the house of representatives of the State of Kansas, as a member thereof from Comanche county, and voted for a United States senator on that day.

48 20. That on February 12, 1874, C. B. Mason, chairman of the committee on elections *in* the house of representatives of the State of Kansas, submitted the following report:

"Concerning the counties of Comanche and Harper no charges or statements, verified or otherwise, have been placed before the committee under the resolution submitting these cases to the committee, and having awaited statements and none having been presented, we might return the papers without comment; but for the information of the house we make the following statements concerning the county of Comanche:

The petition asking organization bears date September 8, 1873, the census return was filed in the office of the secretary of state October 28, 1873, and the proclamation of the Governor on the 28th day of October declared Comanche county organized. The only returns on file in the office of the secretary of state is a certificate of the special county clerk of Comanche county setting forth the following:

'COUNTY CLERK'S OFFICE,
'COMANCHE COUNTY, KANSAS.

'In pursuance of the determination of the board of county commissioners, as canvassers *ex officio* of said county, I, Henry H. Moss, clerk of said board of commissioners, do hereby certify that the town of Smallwood received two hundred and seventy-two votes, being all the votes cast for county-seat; and also that A. J. Mowry received two hundred and seventy-two votes, being all the votes cast for representative of said county, at an election held in said county on the third day of December, 1873.

'In testimony whereof I have hereunto set my hand and affixed the seal of said board of commissioners, at my office, in the town of Smallwood, this fifth day of December, 1873.

'HENRY H. MOSS, [SEAL.]
'*County Clerk.*'

Which return, above copied, on the tenth day of December, 1873, was filed in the office of the secretary of state. The committee found the papers referred to to be regular on their face, and show that prior to the elections mentioned in their re-

49 spective counties they were regularly organized. The committee report that, as appears from returns of the last general

election, over 250 votes were cast in Harper county, and W. H. Horner received 256, and, so far as anything to the contrary is shown, is duly entitled to a seat as member of this house. The committee report that it does not appear that 250 votes were cast in the county of Comanche at the general election next preceding the present session of the Legislature, and therefore report that A. J. Mowry is not entitled to a seat as member of this house by virtue of the recent amendment of the constitution of the State."

Thereupon A. H. Horton moved that all the report be agreed to except that part which refers to the county of Comanche; which motion prevailed.

21. That on February 14, 1874, by consent, A. J. Mowry introduced house bill number 351, entitled "An act to organize the counties of Webb and Wilder for purposes of taxation," which was read the first time.

22. That on the same day the following resolution was offered in the house of representatives of the State of Kansas:

"Resolved, That as there is no evidence of fraud or corruption in the election of the representative from Comanche county, but there only exists a technical point in law in regard to his election, and as previous Legislatures have set the precedent of allowing members under the same circumstances to hold their seats according to the expressed will of their constituents, therefore be it resolved that the member from Comanche is entitled to his seat in this Legislature;" which resolution was adopted.

23. That during the session of the Legislature of the State of Kansas for the year 1874 A. J. Mowry participated as a member of the house of representatives of the State of Kansas from Comanche county during the session of the Legislature.

50 24. That the Legislature of the State of Kansas passed a certain act, entitled "An act to establish the terms of the district court of Harper, Barbour, and Comanche counties and attach the same to the ninth judicial district," which act was approved March 9, 1874, wherein and whereby it was provided for the holding of the terms of the district court of the county of Comanche on the first Tuesdays in July and December of each year.

25. It is further agreed that at the special election on December 3, 1873, at which A. J. Mowry was elected member of the Legislature from Comanche county, Alexander Mills was elected a member of the board of county commissioners of that county, and William Allen county clerk, and that at the first meeting thereafter of the board and before the issue of the bonds in suit Alexander Mills was chosen by said board as its chairman.

26. It is agreed that the following is a report made by the attorney general to the Legislature in 1875: "There is, it will be seen, but little testimony in regard to the population of Comanche county. But testimony was not needed. It was by every one conceded that no one lived there at the time of my investigation. Moreover, I visited the county myself, and declare, as the result of actual observation, that there are no inhabitants in the county, and that there never was a *bona fide* inhabitant there. If Marius sat amid the

ruins of Carthage and wept, I camped upon the townsite of Smallwood (the county-seat) and feasted upon wild turkey with no (white) man to molest or make me afraid. In Smallwood there are two log cabins (both deserted, of course), without doors, windows, sash, or blinds. About a mile off there is another deserted ranch; and these compose the houses of the 'householders' of the county.

51 In this county there is not an acre of land or a dollar's worth of personal property subject to taxation. Its sole inhabitants are the Cheyenne and coyote, the wolf and the Arapahoes, and its organization is and always has been a fraud;" and the following is an extract from the testimony before a legislative committee:

Testimony of Attorney General.

Question. "State what you know about the population of Comanche county, the improvements, school-houses, and school districts in 1874."

Answer. "In October, 1874, I passed through Comanche county, from the east line to what is called the county-seat, Smallwood. Until within about two miles of Smallwood there was no sign either of human habitation or of a house having been in that part of the country. At the crossing of Mule creek, a mile and a half or two miles from Smallwood city, was a deserted ranch, a dug-out, which I examined carefully with a good deal of curiosity. It had apparently been deserted for months; it was equally apparent it was a mere temporary abode, such as I am familiar with on the frontiers of Kansas, used by buffalo hunters, trappers, and horse-thieves. There was this much of a symptom of a settlement, that a small piece of ground was partially enclosed with a heavy log fence—one log and sometimes two logs; no ground broken and no appearance of ground being broken; no stables, no wells; nothing but this dug-out and fence. Between that point and Smallwood nothing. At Smallwood there was one house and a dug-out. The house was a very substantial log house—cedar logs—with a good pine floor. The windows and doors were gone. If any had ever been there, they were not there then. The upper floor had loose paper strewn around over it; scribbling, etc., on the lower. A great many chips were around the house—plenty of material for making camp-fires, but not an indication that a camp-fire had ever been there since the abandonment of the place.

52 A few yards west of that house was a dug-out, fallen in and useless. It had evidently been used to stable horses. I saw neither white man or Indian in that county, except the two who accompanied me, and heard of none. It was to me absolutely certain, from the appearance of the country, the unbroken soil, the state of the roads, and the general appearance of things, that no person had either lived there or been there for months, and I saw no indication that anybody had ever made their home in that country. There was not as much appearance of it as you find in the confessedly abandoned country where buffalo hunters go and thieves hide their stock. I have been all over these counties and have had a great deal of observation on that subject."

27. Said organization was affected solely for purposes of plunder by a set of men intending to secure a *de facto* organization and issue the bonds of said county, register and sell them to distant purchasers ignorant of the facts, and enrich the schemers, while plundering the future inhabitants and tax-payers of the county; and upon the consummation of said scheme, in the spring or early summer of 1874, all of said schemers, together with those who were the said *de facto* officers of the said county, left said county and never returned, and said county remained with said organization totally abandoned until in February, 1885, when said county was, upon memorial presented and census taken, organized as in cases of unorganized counties.

(Signed) WILLIAMS AND DILLON,
Att'ys for Plaintiff.
G. C. CLEMENS,
Attorney for Defendant.

And under the eighth article of said agreed statement certain evidence was introduced, from which the court found the further fact that at some time after their said appointment and previous
53 to the first day of November, 1873, the said temporary officers of said Comanche county duly qualified by taking and subscribing the oath of office required by law in such cases at that time, and no other evidence was introduced and no other fact was found nor agreed, but said action was submitted and determined solely upon the facts hereinbefore set forth, as agreed by said written agreement and the said fact of qualification found by the said court, the only question to be determined by the court being, What upon these facts should be the judgment of the court? And the court, having found in favor of the plaintiff on a part of the coupons in suit, rendered judgment for the plaintiff thereon accordingly, as by the judgment of record more fully appears. The said defendant at the time duly excepted to said finding, conclusion, and decision, and to the rendition of said judgment, and now presents to the Honorable Cassius G. Foster, the judge of the district court of the United States for the district of Kansas, who as a judge of the said circuit court sat alone on the said trial of said case, this its bill of exceptions, and prays that the same may be allowed and signed by him as a true bill of exceptions taken at said trial and may be made a part of the record in this case, which is accordingly done, and the foregoing is hereby allowed and signed as and for a true bill of exceptions taken by said defendant on the trial of said case; and it is hereby ordered that said bill be made, and it is hereby declared to be, a part of the record in this case.

Witness my hand at Topeka, in the district of Kansas, this 1st day of October, A. D. (1888) eighteen hundred and eighty-eight.

C. G. FOSTER,
Judge of the District Court of the United States for the District of Kansas.

54 Endorsed: No. 5114. In the circuit court of the United States for the district of Kansas. Charles Edward Lewis,

plaintiff, *vs.* The Board of County Commissioners of the County of Comanche, in the State of Kansas, defendant. Defendant's bill of exceptions. Filed Oct. 1, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy. G. C. Clemens, Topeka, Kansas, attorney for defendant.

55 In the Supreme Court of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas, Plaintiff in Error,

vs.

CHARLES EDWARD LEWIS, Defendant in Error.

Know all men by these presents that we, Parker Wright, John P. Jones, L. B. Andrews, S. M. Jackson, and D. O. Crane, are held and firmly bound unto Charles Edward Lewis, of the Kingdom of Great Britain, in the sum of five hundred dollars; to the payment of which we bind ourselves by these presents, but, however, upon this express condition, to wit:

That whereas the Board of County Commissioners of the County of Comanche, in the State of Kansas, has caused to be issued from the Supreme Court of the United States a writ of error for the purpose of reversing a judgment against said Board of County Commissioners rendered by the circuit court of the United States in an action in that court wherein the said Charles Edward Lewis was plaintiff and the said Board of County Commissioners was defendant: Now, therefore, if the said The Board of County Commissioners of the County of Comanche, in the State of Kansas, shall prosecute to effect the said writ of error and shall answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

Witness our hands this 1st day of October, A. D. 1888.

PARKER WRIGHT.
JOHN P. JONES.
L. B. ANDREWS.
S. M. JACKSON.
D. O. CRANE.

56 Endorsed: In the Supreme Court of the United States. No. 5114. The Board of County Commissioners of the County of Comanche, in the State of Kansas, plaintiff in error, *vs* Charles Edward Lewis, defendant in error. Cost bond on writ of error. Approved October 1, 1888. C. G. Foster, judge. Filed Oct. 1, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy. G. C. Clemens, attorney for plaintiff in error.

57 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true and complete transcript of the record and proceedings had in said court in the action of Charles Edward Lewis *vs.* The

Board of County Commissioners of the County of Comanche, in the State of Kansas, No 5114, in said court, except that the petition and the amended petition are herein abridged, as in the copies thereof respectively indicated.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, in said district of Kansas, this 16th day of October, A. D. 1888.

{ The Seal of the Circuit Court of the United States, }
{ District of Kansas, 1862. }

A. S. THOMAS, *Clerk*

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Charles Edward Lewis, as plaintiff, and The Board of County Commissioners of the County of Comanche, in the State of Kansas, as defendant, a manifest error hath happened, to the great damage of the said The Board of County Commissioners of the County of Comanche, in the State of Kansas, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States of America, this 1st day of October, A. D. 1888.

{ The Seal of the Circuit Court of the United States, }
{ District of Kansas, 1862. }

A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas.

[Endorsed:] No. 5114. —— —— *vs.* —— ——. Writ of error. Filed Oct. 1, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy.

59 In the Supreme Court of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, in the State of Kansas, Plaintiff in Error,

vs.

CHARLES EDWARD LEWIS, Defendant in Error.

We hereby waive the issuing and service of a citation herein and the notice allowed by law to the defendant in error, and we hereby authorize the clerk of the Supreme Court of the United States to enter our appearance in this proceeding as counsel for the defendant in error.

WILLIAMS & DILLON.
ROSSINGTON, SMITH & DALLAS,
Att'ys for Def't in Error.

[Endorsed:] In the Supreme Court of the United States. No 5114. The Board of County Commissioners of the County of Comanche, in the State of Kansas, plaintiff in error, *vs.* Charles Edward Lewis, defendant in error. Waiver of citation and statutory notice and entry of appearance in the Supreme Court. Filed Oct. 1, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy.

[Endorsed:] In the Supreme Court of the United States. The Board of County Commissioners of the County of Comanche, in the State of Kansas, plaintiff in error, *vs.* Charles Edward Lewis, defendant in error. Writ of error, transcript, and waiver of citation. G. C. Clemens, Topeka, Kansas, attorney for plaintiff in error.

Endorsed on cover: Kansas C. C. U. S. No. 1413. The Board of County Commissioners of the County of Comanche, in the State of Kansas, plaintiff in error, *vs.* Charles Edward Lewis. Filed October 22, 1888.

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1888.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, IN THE STATE OF KANSAS, *Plaintiff in Error*,
v.
CHARLES EDWARD LEWIS,
Defendant in Error.

No. 1413.

ARGUMENT FOR PLAINTIFF IN ERROR.

G. C. CLEMENS AND A. H. SMITH,
Counsel for Plaintiff in Error.

THE GEO. W. CRANE PUBLISHING CO., TOPEKA, KANSAS.

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1888.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, IN THE STATE OF KANSAS, *Plaintiff in Error*, v. CHARLES EDWARD LEWIS, *Defendant in Error.*	No. 1413.

ARGUMENT FOR PLAINTIFF IN ERROR.

IN the fall of 1873, a fraudulent effort was made by a set of adventurers to organize Comanche county, then one of the unorganized counties of Kansas, and innocent alike of inhabitants and of property subject to taxation. Of course, the consummation of the plan necessarily required fraud and perjury without stint, but the anticipated prize was tempting. The object was to secure an organization, *on paper*, then issue bonds in the name of the county, get them registered by the State Auditor, sell them in a distant market, appropriate the proceeds and leave the country. As the result of this conspiracy, seventy-two bonds, for a thousand dollars each, were,

on the 10th day of March, 1874, signed by one Alexander Mills as chairman of the Board of County Commissioners of Comanche county, and by one William Allen as County Clerk, and a seal, purporting to be the seal of the county, was impressed upon them. The bonds were divided into three series: twenty-nine of them were "court-house" bonds, twenty-three of them were "bridge" bonds, and the remaining twenty were to meet "the current expenses of the county, in case of a deficit in the county revenue." They were all dated the same day, all recited an election on the 31st day of January, 1874, all ran ten years from date, all were payable at the same place, and all had similar coupons attached. After these bonds had been executed and sold, in the spring or early summer of 1874, the adventurers and their supposed county officers fled the county, and have never since returned, and the county remained as much without organization as it was before, and was treated by the Legislature as an unorganized county for a period of nearly eleven years, until February 27, 1885, when it was regularly organized under the general statute for that purpose, precisely as any other unorganized county. The defendant in error, a citizen of England, bought the bonds, and in July, 1885, about five months after the organization of the county, sued that organization upon the coupons of the entire three series of bonds. Pleadings were made up, which raised all the issues that could arise out of the facts of the case. A jury was waived by stipulation in writing, and the case was submitted to the court upon an agreed statement of all the facts save one—whether the special officers appointed in 1873 ever qualified or not—and upon evidence adduced, that single fact was specially

found. The court gave judgment in favor of the defendant in error upon the coupons of the bridge and court-house bonds, but held the current-expense bonds void, and, of course, the coupons also. The plaintiff in error excepted to the court's decision as to the bonds sustained, and a bill of exceptions was allowed and signed, setting forth the agreed facts and the fact found, and stating as follows:

"Evidence was introduced, from which the court found the further fact, that at some time after their said appointment, and previous to the first day of November, 1873, the said temporary officers of said Comanche county duly qualified by taking and subscribing the oath of office required by law in such cases at that time; and no other evidence was introduced, and no other fact was found nor agreed, but said action was submitted and determined solely upon the facts hereinbefore set forth, as agreed by said written agreement, and the said fact of qualification found by the said court, the only question to be determined by the court being, What upon these facts should be the judgment of the court? And the court having found in favor of the plaintiff on a part of the coupons in suit, rendered judgment for the plaintiff thereon accordingly, as by the judgment of record more fully appears. The said defendant at the time duly excepted to said finding, conclusion and decision, and to the rendition of said judgment," etc.

Thereupon this writ of error was sued out to reverse the judgment against the plaintiff in error, and the case is now here upon a transcript containing that bill of exceptions. The general question is, of course, whether the plaintiff in error is liable upon the bonds sued on? but that general question involves two others — whether the bonds are valid independently of the question of county organization, and whether they were issued *by the plaintiff in error?* And in the latter question is involved two others — whether the county was so organized in

1874 that it could issue bonds which would be valid in the hands of a *bona fide* holder, and whether, if it was so organized in 1874, the plaintiff in error *is the same corporation* as that which issued the bonds? Each of these questions will be discussed on the present argument, and as the printed record is itself so short that it would not conduce to the court's convenience to repeat here a complete narrative of the facts, while it will prove convenient and greatly contribute to the lucidity of the argument to narrate each particular class of facts in connection with the proposition to which it relates, I shall, with the court's permission, follow that order of arrangement. First, then—

I.

EVEN IN THE HANDS OF A BONA FIDE HOLDER, AND NOTWITHSTANDING THE AUDITOR'S CERTIFICATE OF REGISTRATION, THE BONDS ARE VOID, WITHOUT REGARD TO THE QUESTION OF THE ORGANIZATION OF THE COUNTY.

1. *They are prima facie void.* The court-house bonds were not authorized by any legislative act. They recite two acts—the internal-improvement law of 1872, and chapter 25 of the General Statutes of 1868. The internal-improvement act* provides that bonds may be issued "for the purpose of building bridges, . . . aiding in the construction of railroads or water power, . . . or *other* works of *internal improvement.*" This court has already applied to this act the settled rule of construction, that the general words are controlled by the specific ones, and that only internal improvements of the same general

*See appendix to this argument for a complete copy of this act.

class as bridges, railroads and water power are included in the phrase "other works," &c.

Township of Burlington v. Beasley, 94 U. S. 310.
Osborne v. County of Adams, 106 U. S. 181.

Hence, it is needless to "draw a length of reasoning out" as to the *usual* meaning of the phrase "internal improvements." The case of *Commissioners of Leavenworth County v. Miller*, 7 Kas. 479, even had it *decided* any such question, instead of merely speaking of it by way of illustration, as it did, can have no bearing here; the question is not whether a court house is a work of internal improvement, but whether it is a work of the same general character as a bridge, a railroad and a water power. We must rise to a genus which will include as species those three kinds of improvements, and be able to refer a court house to the genus thus defined. Bridges, railroads and the improvement of water power all belong to the general class—works of civil engineering; improvements which are designed to utilize natural forces, materials and advantages; improvements calculated to develop *material* resources. Is a court house a work of this character? In what respect is a court house *similar* to a bridge, a railroad or an improved water power? Certainly not in its purpose or possible uses. It is similar only in this one respect: that it is a *structure built upon land;* and to give to the words "other works of internal improvement" the meaning, "any structure whatever built upon land," would make the act somewhat far-reaching in its scope! The constitution of Kansas forbids the State from ever becoming a party to "any work of internal improvement;" and if a court house is such a work, surely a State house is, a Governor's mansion, and an

arsenal; yet, is the State forbidden to erect either of these buildings? Would it not surprise Congress if the lands it has granted to some of the States to aid in "works of internal improvement" should be devoted to building school houses, a penitentiary, or court houses?

Not only is a court house not within the terms of that act, but it was specially provided for already by a law that made detailed provision for the whole matter; and even if the general terms of the later act would otherwise include the building of a court house, it should be held to be excluded because of presumed legislative intention.

Lewis v. Sherman County, 1 McCrary, 377.

I conclude, therefore, that the court-house bonds are void, so far as they depend upon the internal-improvement act of 1872.

They are equally void under the other act recited; for that act gives no authority whatever to issue bonds for the purpose of erecting county buildings. The act, so far as material here, is as follows:

"SEC. 16. The board of county commissioners of each county shall have power, at any meeting: . . . . *Fourth*, . . . *to borrow*, upon the credit of the county, *a sum* sufficient for the erection of county buildings, or to meet the current expenses of the county in case of a deficit in the county revenue.

"SEC. 17. The board of county commissioners shall not *borrow money* for the purposes specified in the fourth subdivision of the preceding section without first having submitted the question *of such loan* to a vote of the electors of the county."

"SEC. 19. Whenever it shall become necessary, under the provisions of this act, to submit to a vote of the electors of any county the question of *raising any sum of money by loan*, the said board, after having determined the sum necessary to be raised, shall cause notice of such deter-

mination, and the time when the question will be submitted to the electors of such county, by written or printed hand bills, posted up in five of the most public places in each township, for at least thirty days previous to the time fixed for the taking of such vote.

"SEC. 20. . . . All voting . . . shall be by ballot; and those voting in favor of such proposed *loan* shall have written or printed on their ballots, 'For the loan,' and those voting against the *loan* shall have written or printed on their ballots, 'Against the loan;' and if a majority of the votes cast at such election be against *the loan*, it shall not be made." (Ch. 25, Gen. Stat. 1868, and Comp. Laws of 1885.)

The bonds are headed, "Court House Bond of the County of Comanche," and they contain only these recitals:

"This bond is executed and issued for the purpose of *erecting county buildings*, in pursuance of and in accordance with an act of the Legislature of the State of Kansas, entitled 'An act relating to counties and county officers,' approved February 29th, 1868, *and*, 'An act to authorize counties, incorporated cities, and municipal townships, to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2d, 1872, and also in accordance with the vote of the majority of the qualified electors of said county of Comanche, at a special election duly and regularly held therefor on the 31st day of January, 1874."

The Supreme Court of Kansas had decided, before these bonds purport to have been issued, that the sections of chapter 25 of the General Statutes which are quoted above authorized counties to issue bonds as evidences of debt for money borrowed, on the ground, as stated in the opinion, that "power to borrow money carries with it the power to issue the ordinary evidences and security of a loan, and among them are county bonds."

Doty v. Ellsbree, 11 Kas. 209–213.

So, if these bonds were issued for the purpose of *borrowing money*, they are within the recited power. But the bonds were not issued as evidences of debt for borrowed money; they were issued for the purpose of *erecting county buildings*. Recitals are to be strictly, even technically, construed. Shylock may have his pound of flesh, but must not shed "one drop of Christian blood"; his bond gives him, "not less, nor more, but just a pound of flesh." What the recitals say in unequivocal terms binds, not the county alone, but the bondholder as well, and every ambiguity or uncertainty is to be resolved against him. So this court has said. Thus, in *School District v. Stone*, 106 U. S., replying to counsel's protest against the construction put upon recitals, the court observed:

"This construction of the words employed in the bonds is characterized by counsel for the defendant in error as too technical. It may be a strict construction, and such, it seems to the court, ought to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry whether bonds issued in its name were made in violation of the constitution and of the statute, of the provisions of which all must take notice. Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers — invested with authority to determine whether such conditions have been performed — the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held, in favor of *bona fide* purchasers of value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the

recitals fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without authority, of law." (*School District v. Stone*, 106 U. S. 183, 186, 187.)

The recitals here spoken of were as follows:

"This bond is issued by the board of school directors, by authority of an election of the voters of said school district, held on the thirty-first day of July, 1869, in conformity with the provisions of chapter 98 of acts 12th General Assembly of the State of Iowa."

The act referred to, as well as the State constitution, contained a provision that no municipality should become indebted beyond a certain percentage of its taxable property; and the aggregate of the issue of the bonds in suit exceeded considerably the limit thus prescribed; and, therefore, the bonds, upon well-established principles, said the court, were not enforceable obligations against the district, unless it was estopped by their recitals from showing, against a *bona fide* purchaser, the fact of this excess. The construction which, in the opinion above quoted, it was said the counsel for defendant in error had characterized as "too narrow and technical," was as follows:

"The recitals do not . . . necessarily import a compliance with the statute or the fundamental law of the State upon that subject. They necessarily imply nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute. The statute may have been pursued as to the notice required to be given of the time and place of the election, and as to the manner in which the will of the

voters was to be ascertained, and yet it may have been disregarded in respect of the limit it imposed upon district indebtedness. The declaration, therefore, that the election was held in conformity with the statute, does not, with sufficient distinction, imply that the indebtedness voted was less than five per cent.," etc. (Page 186.)

Recitals, then, operate by way of estoppel, only so far as they are "clear and unambiguous," and "*necessarily* imply" the identical facts, to prevent inquiry as to which the estoppel is urged.

Now, by these recitals is it "*necessarily* implied," for certainly it is not stated, that the bonds were issued for the purpose of *borrowing money* with which to erect county buildings? If the bonds were put upon the market and sold at a large discount, the proceeds to be used in erecting county buildings, would not this recital be, at least, equally as true as if money were borrowed for that purpose and the bond given for the loan? But this the law does not permit; the bonds and the borrowed money are to be equal in amount. Bonds are not to be made and sold in the market, but they are to be given for a loan obtained precisely as a natural person would give his note for a loan. What this recital does imply is, that *the bonds themselves* were used in payment of the cost of erecting county buildings. When we compare the provisions of section 18 of the law with the provisions we are discussing, it becomes clearly apparent that the Legislature intended the cost of county buildings should be paid in cash, and that the contracts should be let on a cash basis; that a tax was to be collected, or, having determined the amount needed and obtained the consent of the taxpayers, the commissioners were to go to a bank or elsewhere and borrow the money, and pay it into the treasury, to be

available for the purpose intended. It never was designed that bonds should be issued, and either paid out to contractors or sold; but *the money* was to be actually borrowed at legal rates, and if a bond was given, it was to be given for the loan. There is no provision as to the time, the rate of interest, or the mode of payment; and if bonds were to be issued and sold, at what discount might they be negotiated? Even where *bonds* were *expressly* authorized to be sold, and the proceeds to be paid over to a railroad company, it was held that it was unlawful to deliver the bonds themselves directly to the company; (*Scipio v. Wright*, 101 U. S. 665; approved in *Thompson v. Perrine*, 103 U. S. 806–810:) but here the power to issue bonds at all is only *implied* from the power to *borrow money*, and under that *implied* power bonds are issued directly for the purpose for which the money was to be borrowed, and the express power, in connection with which alone the power to issue bonds is implied, is entirely passed by—not exercised at all! This is one move further yet from the transaction declared illegal in *Scipio v. Wright*, and surely cannot be tolerated. What the court decides here, as to what happened long ago, will become a precedent for the future; and to tell every board of county commissioners that, instead of borrowing money to erect county buildings or to supply deficient revenue, they may issue bonds and sell or exchange them at what rate they choose—may make contracts on a credit basis the Legislature meant should be based on cash—is to throw open yet wider the already huge door through which giant fraud, ushered by collusion, may enter into county fiscal affairs. Whatever these provisions meant in 1874, they mean now—will mean in the future; and a decision

here as to the past is a letter of instructions as to the future to every board of county commissioners in Kansas. (Concerning the construction we contend for, see, on the precise point, *Lewis v. Board of County Commissioners of Sherman County*, 1 McCrary C. C. 377.)

But counsel may say the recital is, that the bonds are issued "for the purpose of erecting county buildings, *in pursuance of and in accordance with*" the statute; and that erecting county buildings in accordance with the statute meant, among other things, by borrowing the money for the purpose; hence, that, after all, the recitals *do* show that the bonds were issued as evidences of indebtedness for money borrowed, and that they are therefore valid on their face. It must be conceded that the recital—"*in pursuance of and in accordance with*" the statute—can be thus applied to the purpose for which the bonds are issued; but this only shows that it is capable of either of two meanings, and, therefore, is not "clear and unambiguous." And, besides, while the recital admits a choice of interpretations, the choice must be made; and, when made, adhered to throughout. The cake cannot be both eaten and left for future feasting. So we can read the recital this way: "This bond is executed and issued in pursuance of and in accordance with an act of the Legislature of the State of Kansas, entitled 'An act relating to counties and county officers,' approved February 29, 1868, for the purpose of erecting county buildings;"—applying the recital of the law *to the circumstances attending the issuing of the bonds;* or, we can read it this way: "This bond is executed and issued for the purpose of erecting, in pursuance of and in accordance with an act of the Legislature of the State of

Kansas, entitled 'An act relating to counties and county officers,' approved February 29, 1868, county buildings" —thus applying the recital of the law *to the mode of executing the purpose.* But we must apply it *exclusively* to either the circumstances of issuing the bonds, *or* to the mode of executing the purpose; not to both. It must have a meaning, and but one meaning; else it is ambiguous, and will be no estoppel at all. If it means *the bonds were issued* in pursuance of and in accordance with the statute, then it does not mean that *the county buildings were to be erected,* nor *the current expenses to be met,* in pursuance of and in accordance with the statute; and, if it means the latter, then it does not mean that the bonds were *issued* "in pursuance of and in accordance with" the statute; and, in that event, there are no recitals at all showing that the bonds were *legally issued;* but the recitals, omitting the circumstances of issuing them, merely show that the bonds, whether regularly or irregularly made, were issued *for a lawful purpose.* Hence, the plaintiff has his choice of the horns of a very interesting dilemma. The recitals refer to either this or that. If to this, the bonds are void because no law authorized them to be issued at all; if to that, the bonds are void, because the fraudulent circumstances attending their execution and delivery are open to proof as a defense. This dilemma exists in all its force, else was *School District v. Stone* erroneously decided.

But even this is not all; whatever was done "in pursuance of and in accordance with" the law, was done in pursuance of and in accordance with *both* acts recited; and it would be somewhat difficult to erect a court house in full compliance with each of two laws so

utterly at variance in their provisions! However, it is quite apparent that the reasonable construction of these recitals is, that the bonds themselves were issued according to the recited laws, and not that the buildings were to be erected according to the provisions of those acts; and hence we may conclude with a syllogism—usually a very substantial mode of reasoning:

Unless these bonds were issued for the purpose of borrowing money, they are void.

But these bonds were not issued for the purpose of borrowing money.

Therefore, they are void.

2. *The "bridge" bonds are also prima facie void.* They recite only the internal-improvement act; and by reference to that act it will be observed, that bonds are not authorized for the purpose of building *bridges*, but only for the purpose of building *some particular bridge*, which is to be named in all of the proceedings. The contract is to be let on the basis of payment in the bonds themselves at par; and the whole proceedings are of so special a character that, in the registration of the bonds, even the person "to whom issued" is to be named. (See secs. 4, 6, 9, 12, of act, in appendix to this argument.)

Now, observe: the only suggestion anywhere in these bonds, as to the purpose for which they were issued, is *the heading* only. No purpose at all is *recited*. The heading is, "Bridge Bond of the County of Comanche—*Ad astra per aspera*," and if "bridge" is to be treated as a recital, so will "*Ad astra per aspera*," I suppose. But for what is a "bridge bond" issued—to build *bridges*, or *a bridge?* One purpose is lawful; the other is not. And

does this heading "*unequivocally*" imply one purpose more than the other? The recital is: "This bond is executed and issued in pursuance of, and in accordance with," the internal-improvement act; but it does not deign to tell us what *the purpose* of its issue was, unless this recital is a legal conclusion—a statement by the commissioners that, in their opinion, the purpose, whatever it was, fell within the authority granted by the act. But recitals of law work no estoppel; they have *no* effect at all, for the commissioners have no power to decide questions of law, so as to make their decisions even *prima facie* valid. (*Dixon County v. Field*, 111 U. S. 93; *Katzenberger v. Aberdeen*, 121 U. S. 172–176, 177.) If, then, we treat the heading as a recital, it is ambiguous—it may mean either bridges or a bridge—and no purpose is recited otherwise than by an inoperative legal conclusion; hence, the bond in reality recites no purpose at all. But if no purpose is recited, will any be presumed? Such is not the usual rule applied to cases of limited power. Even the jurisdiction of the Federal courts must appear upon the face of the record—no presumption is to be indulged. Commissioners have no *general* power to issue bonds; they can issue them only under certain conditions and for the accomplishment of certain purposes. The power is limited, and the evidence of a right to exercise it must appear upon the face of the bonds themselves, or be shown by extrinsic proof; hence, the bridge bonds are *prima facie* void.

II.

The Bonds are Open to Proof of the Actual Facts, and are therefore Void.

1. It will be observed that each of the bonds, even as set forth in the exhibits to the petition, is payable "to ————or bearer," so that it is averred that at the time the action was brought the blank for the payee's name still remained unfilled. The defendant in error must, therefore, have bought the bonds when they were in this condition. The agreed statement of facts admits his *bona fides*, but the agreement is only as to *facts*. As *matter of law*, however, no purchaser of otherwise negotiable paper bearing upon its face such a blank as this, can enjoy the law merchant's protection. Any holder might fill up the blank, and his vendee be an innocent purchaser; but no one can be innocent, in the sense of the law merchant, who buys with the blanks unfilled. (See *Hogarth v. Latham & Co.*, L. R., 3 Q. B. Div., 643; *France v. Clark*, L. R., 29 Ch. Div., 257; *Hatch v. Searles*, 2 Sm. & Giff. 147, 152; *Taylor v. Great Indian Peninsula Railway Co.*, 4 DeG. & J. 559, 574.) A man may, *as a fact*, be a *bona fide* purchaser of a stolen horse; but not in the *legal* sense that will protect his possession. So, Lewis may have been a *bona fide* purchaser of a void bond, or of one open to defenses. *Bona fides* alone is not *always* complete protection. Of course, if the bonds were open to defenses, they were absolutely void under the agreed facts of the case.

2. "If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but *by reference to some express and definite record of a public char-*

acter, then the true meaning of the law would be, that the authority to act at all depended *upon the actual objective existence* of the requisite fact, *as shown by the record*, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the existence of such a power *might be put to proof of the fact*, made a condition of its lawfulness, *notwithstanding any recitals in the instrument.*" (*Dixon County v. Field*, 111 U. S. 93; *National Bank v. Porter Township*, 110 U. S. 608; *Buchanan v. Litchfield*, 102 U. S. 278.) The court had foreshadowed this ruling in *School District v. Stone*, (106 U. S. 183–185,) where it was said:

"Waiving any discussion of the question, whether the constitutional requirement that the amount of the taxable property should be ascertained by the last State and county tax lists did not compel every purchaser, at his peril, to obtain from that source the necessary information, and did not preclude him from relying upon the representations of district officers as to what those lists disclosed, we are of the opinion that the recitals in the bonds do not necessarily or distinctly import any determination of that question by the district officers invested with authority, under certain circumstances, to issue them."

We shall presently see that registration and recitals possess precisely the same efficacy; and, indeed, in *Dixon County v. Field*, where the rule we are now stating was distinctly laid down as the basis of the court's action, the bonds were regularly registered. Now, the internal-improvement act of 1872 expressly provided that "before any bonds shall be issued, as herein provided, the same shall be ordered by a vote of the qualified electors of such county." (Sec. 3.) But the county commissioners could not, of their own motion, order an election to be

held. They were powerless, destitute of authority to act at all under the act, unless "a petition, signed by at least one-fifth of the voters of (the) county, ... *said one-fifth to be determined by reference to the returns of the last preceding general election in such county*," should be presented to them, "asking that a vote be taken upon the question" to be submitted. Then, and not until then, it became their duty, and they became possessed of the power, to order an election. (Sec. 4.) This provision, requiring "that the proceedings should be initiated by a petition of voters," was material, and compliance with it was essential to the validity of bonds issued under this act. (*Crow v. Oxford Township*, 119 U. S. 215–221.) Here, then, a "fact necessary to the existence of the authority" (the sufficiency of the petition) "was by law to be ascertained, not officially, by the officers charged with the execution of the power, but by reference to some express and definite record of a public character"—the returns of the last preceding general election; and hence, "the authority to act at all depended upon the actual objective existence of the requisite fact, *as shown by the record;*" and "all persons claiming under the exercise of such a power"—as the plaintiff in this case—may "be put to proof of the fact made a condition of its lawfulness"—the sufficiency of the petition according to the statutory test—"notwithstanding any recitals in the instrument."

Are we not upon solid ground so far? Well, then, see where we are! "In the construction of the statutes of this State, . . . the term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November, in each year;" (Compiled Laws 1885, or Gen. Stat. 1868, ch. 104, sec. 1,

subdivision twenty-sixth;) and these rules of construction become part of each new statute enacted, unless the new statute contains special provisions excluding them; (*Gilleland v. Schuyler*, 9 Kas. 569, 580, 581;) and the plaintiff, if he claims under the internal-improvement act of 1872, is "put to proof" that, previous to the election alleged in these bonds to have been held January 31, 1874, a petition had been presented to the county board, asking that such an election should be held, and that that petition, *tested "by the returns of the last preceding election"* — the regular election held all over the State on the Tuesday succeeding the first Monday in November, 1873 — was signed by at least one-fifth of the voters of Comanche county. He must know whether there was a petition *which would bear that test;* and "notwithstanding any recitals in the instrument," the laws permit us to show there was no such petition, and thus to defeat him. Now there was no such petition; for the very ample reason that such a petition was impossible. The special officers to organize the county were not appointed till October 28, 1873, and *no* election *could have been* held without thirty days' notice, (see sec. 3 of statute, ~~Appendix,~~) and none *was* held for any purpose till December 5, 1873, and the act providing for that election expressly declared it a *special* election. Hence, previous to the date of the alleged bond election, no general election had ever been held in Comanche county; and no petition could have been presented which contained the names of one-fifth of the voters, "said one-fifth to be determined by the returns of the last preceding general election in the county," and this the plaintiff, when he purchased the bonds, was bound to know; for the statute expressly directed him to ascertain

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that fact. No county in which no general election has yet been held can under any circumstances legally issue bonds under the internal-improvement act; such counties are excepted out of its provisions as effectually as if a proviso to that effect were inserted in terms. If, then, this law directs "the fact necessary to the existence of the authority . . . to be ascertained by reference to some express and definite record of a public character," to wit, the returns of the last preceding general election; and if, in such a case, all persons claiming under the exercise of such a power (may) be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument;" and if, in this case, the proof shows no such record of a public character had as yet come into existence in this county, and legally could not have existed when these bonds were issued, so that "the fact necessary to the existence of the authority," and of "the actual objective existence" of which the plaintiff is put to proof in order to sustain his bonds, cannot by any possibility be proved, because it did not exist, is it not inevitable that, so far as they depend upon this law, the bonds are totally void in the hands of the plaintiff? Where is there a hope of escape from this conclusion?

As the "bridge" bonds can claim no other authority than this law, the conclusion now reached disposes of them entirely, without the aid of an additional objection.

3. Again, the "court-house" bonds either recite an unlawful purpose, or they are ambiguous as to their purpose. Hence, if they are not void on their face for the first reason, they are open to defenses for the second. Not only are they open to defenses, but some lawful purpose must be proved in order to make them *prima facie*

valid; for facts necessary to the right to exercise a limited authority will not, in case of silence, be presumed.

As an answer to all of these serious objections, counsel will doubtless "point with pride" to the Auditor's certificate of registration and to a dog's-eared quotation from the opinion in *Lewis v. The Commissioners*, 105 U. S. 739; but it is time, I should think, for the holders of bonds to "view with alarm" the disinclination of this tribunal to follow that case, though so often appealed to; for it has never yet been applied to any subsequent case. As interpreted by counsel who are constantly citing it, that opinion converts into an entire State government the man elected to attend to keeping the State's books. Never before did a modest bookkeeper have thrust upon him such onerous and such important duties. But what was really decided by that opinion? Nothing but that the registration was conclusive, in favor of a *bona fide* holder, that the bonds had been duly issued from the State Treasurer's office, where they were to be placed *in escrow*. It was not held that the certificate was conclusive as to anything else whatever. But the court has since settled the effect of registration, and it is now held here that it is but another mode of recital; and that the certificate has precisely the same efficacy, and no more, as recitals upon the face of the bonds. "No conclusive effect is given . . . to this registration, nor to these certificates; and in the consideration of the question of estoppel, they may be laid out of view. In any event, they could not be considered as more comprehensive or efficacious than the statements contained in the body of the bonds, and verified by the signatures of the county officers and the seal of the county, except as additional steps, required

to be taken in the process of issuing the bonds, and rendered necessary to their validity." (*Dixon County v. Field*, 111 U. S. 83–92—applied to the Kansas registration law in *Crow v. Oxford Township*, 119 U. S. 215–221.)

The questions we raise do not relate to the mere regularity of *issuing* the bonds, but to the *power* to issue them at all. The Auditor's certificate, no more than the recitals, proves what can be proved in no other way than by "the returns of the last preceding general election;" it is not a conclusive decision that a court house resembles a water power and a bridge, nor that commissioners with authority to borrow money for the purpose of building a court house may execute that power by building a court house on ten years' credit. In short, it is *conclusive* of nothing at all, however much it may avail as *prima facie* proof of what it states. But, in considering the court-house bonds with reference to the law authorizing money to be borrowed by the commissioners, the fact and the certificates of registration are to be left entirely out of the case, for, as bonds issued under the authority of chapter 25 of the General Statutes, they were not eligible to registration, and their registration was, therefore, void. The only provision authorizing the registration of bonds issued under any statute other than the internal-improvement act, is contained in section 15 of that act, and is as follows: "That the holder of bonds heretofore issued, or that may hereafter be issued, *in pursuance of any contract heretofore made*, under any law of this State, may have the benefit of this act by having such bonds registered in the office of said Auditor of State, as provided herein for the registration of bonds (issued) by virtue hereof;" the meaning of which is,

that bonds issued under any other law, in pursuance of a contract which had been made *before the enactment of the internal-improvement act of 1872*, might be registered as thus prescribed. This is the way it has been understood by the Supreme Court of the United States,* (*Bissell v. Spring Valley Township*, 110 U. S. 162–170,) and no other meaning can be given to it. Now, as the internal-improvement act took effect, as amended, March 9, 1872, while Comanche county, if organized at all, was not organized until October, 1873, it is impossible that it could have made, previous to the enactment of that law, any contract whatever under which these bonds could have been issued. The State Auditor was, therefore, without jurisdiction, and his certificate can have no bearing upon these bonds, so far as they depend for their validity upon the General Statutes of 1868. (*Crow v. Oxford Township*, 119 U. S. 215.) Besides, the registration was not complete. (*Bissell v. Spring Valley Township*, 110 U. S. 162.)

III.

THE BONDS WERE NOT ISSUED BY THE PLAINTIFF IN ERROR.

The bonds do not purport to have been issued by Comanche *county*, nor could *the county* have issued bonds. They purport to have been issued by *the Board of County Commissioners* of Comanche county, which is a corporation, invisible, intangible, ideal, existing only in contemplation of law. The plaintiff in error denied, by a sworn answer, that it had ever existed at any time previous to February 27, 1885—nearly eleven years after the bonds

*"The act also makes provision for the registration of bonds not issued under it, but issued either before its enactment or in pursuance of agreements entered into before it took effect"—quoting, then, section 15.

purport to have been issued; and this is the issue to which nearly all of the agreed facts relate. This is not a suit in equity, seeking, on equitable grounds, to make the plaintiff liable upon the obligations of *another* corporation, which had once existed, but which had been dissolved. The petition does not allege that any corporate or public property passed from some previous body corporate to the plaintiff in error, nor that it is the legal successor of some previous corporation; but it alleges, and alleges that only, that the plaintiff in error itself issued these bonds March 10, 1874. Both allegation and proof are essential to a judgment; and of course the circuit court's judgment is, when construed in connection with the pleadings upon which it was based, an adjudication that the identical corporation, which is the plaintiff in error, itself executed and issued, March 10, 1874, the bonds and coupons in dispute. So we may leave all equitable considerations, and all questions of privity and of succession, out of the case; and with these considerations left out, not one of the decisions made by this court in such cases as that of *Broughton v. Pensacola*, 93 U. S. 266, has any bearing as a precedent here. The simple question is, Did *this plaintiff in error* — not some other corporation — exist March 10, 1874? The judgment, to be proper, must respond to that issue.

In the first place, then —

1. *No corporate body at all, for the local government of Comanche county, existed at the date of these bonds.* Certain proceedings were had in 1873 for the organization of Comanche county. The law then in force which authorized proceedings for that purpose was, so far as of consequence here, as follows:

Chapter 24 of the General Statutes of 1868 divided the State of Kansas into seventy-nine counties—numbered, named and described—among which was the unorganized county of Comanche; and section 81 of that chapter provided as follows:

"SEC. 81. The counties above established and defined, or any of them which are unorganized, may be organized under the provisions of 'An act relating to the organization of new counties,' approved June 4, 1861: *Provided*, That before any such organization shall take place, the persons asking for the same shall take, or cause to be taken, a census of the county proposed to be organized, verified by affidavit, and showing that said county contains not less than six hundred inhabitants, excluding Indians not taxed, and who are *bona fide* residents of the county, and citizens of the United States: *And provided further*, That no such county shall be entitled to representation in the Legislature until it shall have been organized as herein provided."

The "act relating to the organization of new counties," thus referred to, was amended in 1872, and remained as then amended until 1876; and the amended act of 1872, so far as it has any bearing on this case, was as follows:

"SECTION 1. When there shall be presented to the Governor a memorial signed by forty householders, who are legal electors of the State, of any unorganized county, showing that there are six hundred inhabitants in such county, and praying that such county may be organized, accompanied by an affidavit attached to such memorial, of at least three householders of such county, showing that the signatures to such memorial are the genuine signatures of householders of such unorganized county, and that the affiants have reason to and do believe that there are six hundred inhabitants in such county, as stated in the memorial, it shall be the duty of the Governor to appoint some competent person, who is a *bona fide* resident of the county, to take the census, and ascertain the number of *bona fide* inhabitants of such unorganized county, who shall, after being duly sworn to faithfully discharge the duties of his office, proceed to take the census of such

county, by ascertaining the name and age of each of the *bona fide* inhabitants of such unorganized county, who shall receive, for services rendered under this section, pay at the rate of three dollars per day, from the State Treasurer, upon an itemized account verified by affidavit. The person who shall take the census as required shall return to the Governor, upon appropriate schedules, the census authorized to be taken herein, certified to be correct and true; and if it appear by such return that there are in such unorganized county at least six hundred *bona fide* inhabitants, he shall appoint three persons, who shall be recommended in the memorial herein provided for, to act as county commissioners, and a proper person to act as county clerk, to be recommended in like manner as the commissioners, and shall designate such place as he may select, centrally located, as a temporary county seat for such county, and shall commission such persons as such officers, and declare such place the temporary county seat of such county; and from and after qualification of the officers appointed under this section, the said county seat shall be deemed duly organized.

"SEC. 2. That said commissioners and such clerk, before entering upon the discharge of their respective duties, shall take and subscribe an oath faithfully, promptly and impartially to perform them as herein required; and such oath shall be filed with, and kept in the office of, the county clerk.

"SEC. 3. The said commissioners, or a majority of them shall proceed to divide such county into suitable and convenient townships. Each township shall constitute an election precinct, and such commissioners shall give at least thirty days' previous notice of the time which they shall fix upon for holding the first election of township and county officers, by conspicuously posting up, in three of the most public places in each township, notices of such election, subscribed by a majority of themselves, and attested by the clerk; the notices posted in each township specifying the place for voting therein." (Gen. Stat., § 3, p. 249.)

"SEC. 8. Any person elected to a township office at the first election shall, when qualified as the law directs, continue to hold his office until the next annual township meeting, and until his successor shall be elected and qualified; and all county officers shall, in like manner,

hold until the next general election, and until their successors shall be elected and qualified.

"SEC. 9. It shall be the duty of the county commissioners to make out, and cause to be entered upon the records of the county, an accurate description of the townships into which the county shall, by them, have been divided; and it shall be the duty of the county clerk to make out and transmit to the Secretary of State a map of the county, as divided into townships, and the name and description of each township."

On the 8th of October, 1873, a memorial, purporting to be signed by more than forty householders of Comanche county, suggesting the names of persons for special commissioners and clerk, and praying the organization of the county, was, together with an affidavit, as required by the statute, presented to the Governor of Kansas; and another petition subsequently presented requested him to declare "the town of Smallwood" the temporary county seat, the original memorial having suggested a quarter-section of Government land as the candidate. The petition in behalf of "Smallwood" stated, as reasons for making that place the county seat, that it was "geographically near the center of the county," had "plenty of timber and water near," was "better located to command the trade of the county than any *other* town," and that "*the heaviest settlement of Comanche county*" was "in the vicinity of Smallwood." What was Smallwood? *A log cabin, a "dug-out" for horses, and some chips!* Whence was Smallwood's "trade" to come? From a log fence around a tract of unbroken land, ornamented by a dug-out, situated a mile or two "out in the country!" At a special session of the Legislature in September, 1874, this resolution was passed:

HOUSE JOINT RESOLUTION No. 1,

To appoint a committee to examine the condition of Barbour, Comanche and Harper counties.

[Session Laws 1875, p. 251.]

Whereas, It appears from the report of the Secretary of State, made to this House on the sixteenth day of September, A. D. 1874, that there are but six hundred and eight inhabitants in the county of Barbour, and that the county of Comanche has but six hundred and thirty-four inhabitants, and that the county of Harper has but six hundred and forty-one inhabitants; and,

Whereas, It further appears from the report of the Auditor of State, made to this House on the sixteenth day of September, A. D. 1874, that the present bonded indebtedness of the county of Comanche, so far as can be ascertained at present, is seventy-two thousand dollars, and that the present bonded indebtedness of the county of Harper is forty thousand dollars, and that the present bonded indebtedness of the county of Barbour is one hundred and forty-one thousand three hundred dollars; and,

Whereas, It is important that the interest of the people and the honor of the State should be protected, and in order to enable the Legislature that shall convene in January, A. D. 1875, to have the proper and necessary information for intelligent action respecting the condition of said counties: therefore,

Be it resolved by the Legislature of the State of Kansas:

SECTION 1. That a committee of two be appointed (one by the Speaker of the House of Representatives and one by the President of the Senate), whose duty it shall be, in connection with the Attorney General, to proceed at once and fully and carefully investigate the facts in respect to the organization, present condition, financial and otherwise, and as to the number of inhabitants, of the said counties of Barbour, Comanche and Harper, such investigation to be completed on or before the first day of December, A. D. 1874; and said commissioners shall make a full report respecting the matters hereinbefore named to the Governor, and the said report shall be submitted by the Governor to the next Legislature with his message.

This joint resolution was published, and became thereby a public act of the State, to be thereafter judicially noticed. (Session Laws of 1875, p. 251.) Acting under this resolution, the Attorney General made a report to the Legislature, which is set forth in article 26 of the agreed statement of facts contained in the bill of exceptions, and was as follows:

"There is, it will be seen, but little testimony in regard to the population of Comanche county; but testimony was not needed. It was by every one conceded, that no one lived there at the time of my investigation. Moreover, I visited the county myself, and declare, as the result of actual observation, that there are no inhabitants in the county, and that there never was a *bona fide* inhabitant there. If Marius sat amid the ruins of Carthage and wept, I camped upon the town site of Smallwood (the county seat) and feasted upon wild turkey, with no (white) man to molest or make me afraid. In Smallwood there are two log cabins, (both deserted, of course,) without doors, windows, sash or blinds. About a mile off there is another deserted ranch; and these compose the houses of the 'householders' of the county. In this county there is not an acre of land or a dollar's worth of personal property subject to taxation. Its sole inhabitants are the Cheyenne and coyote, the wolf and the Arapahoes, and its organization is, and always has been, a fraud."

This report, being an inquisition, was *prima facie* proof of its facts. (1 Greenleaf's Ev., sec. 556.)

The same article of the agreed statement of facts states, that "the following is an extract from the testimony before a legislative committee" given by the Attorney General:

"Q. State what you know about the population of Comanche county, the improvements, school houses and school districts, in 1874.

"A. In October, 1874, I passed through Comanche county, from the east line to what is called the county seat—

Smallwood. Until within about two miles of Smallwood there was no sign, either of human habitation or of a house having been in that part of the county. At the crossing of Mule creek, a mile and a half or two miles from Smallwood City, was a deserted ranch—a dug-out—which I examined carefully, with a good deal of curiosity. It had apparently been deserted for months. It was equally apparent it was a mere temporary abode, such as I am familiar with on the frontiers of Kansas, used by buffalo hunters, trappers and horse thieves. There was this much of a symptom of a settlement, that a small piece of ground was partially enclosed with a heavy log fence—one log and sometimes two logs—no ground broken, and no appearance of ground being broken; no stables; no wells; nothing but this dug-out and fence. Between that point and Smallwood, nothing. At Smallwood there was one house and a dug-out. The house was a very substantial log house, cedar logs, with a good pine floor of regular flooring; above was a loft, or half-story, reached by a trap-door, with a good floor. The windows and doors were gone, if any had ever been there; they were not there then. The upper floor had loose papers strewn around over it; scribbling, etc., on the lower. A great many chips were around the house, plenty of material for making camp fires, but not an indication that a camp fire had ever been there since the abandonment of the place. A few yards west of that house was a dug-out, fallen in and useless. It had evidently been used to stable horses. I saw neither white man or Indian in that county, except the two who accompanied me, and heard of none. It was to me absolutely certain, from the appearance of the country, the unbroken soil, the state of the roads, and the general appearance of things, that no person had either lived there or been there for months; and I saw no indication that anybody had ever made their home in that country. There was not as much appearance of it as you find in the confessedly abandoned country, where buffalo hunters go and thieves hide their stock. I have been all over these counties, and have had a great deal of observation on that subject."

Article 27 of the agreed statement of facts gives this general account of the mode and purposes of the alleged organization of the county in 1873:

"27. Said organization was effected solely for purposes of plunder, by a set of men intending to secure a *de facto* organization and issue the bonds of said county, register and sell them to distant purchasers ignorant of the facts, and enrich themselves, while plundering the future inhabitants and taxpayers of the county; and upon the consummation of said scheme, in the spring or early summer of 1874, all said schemers, together with those who were the said *de facto* officers of the said county, left said county and never returned, and said county remained with said organization totally abandoned until in February, 1885, when said county was, upon memorial presented and census taken, organized as in cases of unorganized counties." (See printed record, pp. 31, 32, 33, for the foregoing extracts.)

With such a state of affairs, the county being uninhabited, and having within its entire borders no place of abode but one log house, two "dug-outs," a log fence around some unbroken land, and a pile of chips; and with the sole motive of organizing *on paper* for purposes of plunder, the fraudulent memorial of forty "householders," was presented to the Governor. He appointed a census taker who, on the 15th of October, qualified in Barbour county—still distant from the scene of his operations, (see article 5 of agreed statement of facts, printed record, pp. 27, 28,) and between that date and the 28th of October—thirteen days—he had made his way to Comanche county, got the names and ages of the over six hundred men, women and babes who made their homes in the cabin, the two "dug-outs," the log fence and the chips, and had returned his report and schedules to the Governor's office at Topeka! Thereupon the Governor appointed special county commissioners and a special county clerk, and, by proclamation, declared Smallwood the county seat. Whether bonfires lit up the jubilant heavens over the streets of that thriving city, and the en-

tire population turned out of the cabin to rejoice over the assured prospect of commanding the entire country trade of the dug-out and the logfence, is not stated in the record, and a future D'Israeli may probably record the occurrence in some new chapter of "Events that Never Took Place." The special commissioners proceeded with the business before them, and in due time held a special election—it must have been exceedingly special—and through *the forms* of law secured a set of county officers, and by unanimous vote chose a member of the Legislature and located the county seat permanently at Smallwood. The member elect appeared in January, 1874, at the bar of the House, was sworn and seated, and throughout the session continued to be recognized as "the gentleman from Comanche." Talk of British M. Ps. representing old castles and deserted hamlets! Mowrey's constituents were a cabin, a fence, two dug-outs, and a pile of chips! An investigation was set on foot by the House, and, through the duly whitewashed fiery furnace, the Comanche Hebrew child came out unsinged. He was declared to be as honestly seated as the rest of the members—one must not be too particular about such matters—and he continued to sit. One day he introduced a bill and rushed it through as far as to a first reading, (agreed facts, article 21,) and on another day voted in the House for a United States Senator, (*id.*, article 19.) At the January term of the Supreme Court of Kansas held in 1874, and during the session of the Legislature in which Mowrey sat, the opinion was announced in the case of *The State, ex rel. the Attorney General, v. Board of County Commissioners of Pawnee County*, 12 Kas. 426, in which it was decided that—

"Where a county has a *de facto* organization, and the records of its organization appear to be regular and valid upon their face, and the Governor has recognized and proclaimed the organization to be valid, a legislative recognition of the validity of such county organization will make the same valid, although the original organization may have been defective and fraudulent."

And that—

"An act of the Legislature, providing that such county be detached from the county to which it had formerly been attached for judicial purposes, and not attaching it to any other county, but providing that terms of the district court may be held in the county so detached, is a legislative recognition of the validity of the organization of such county."

This was a good suggestion to county-organization financiers, and it was not thrown away. Three counties were in need of some such treatment, and it was applied. A bill was introduced, which in due time reached the Governor's hands; and having been approved March 9, 1874, lacked nothing but publication to make it a law. It was as follows:

AN ACT

To establish the terms of the District Court in Harper, Barbour and Comanche counties, and attaching the same to the Ninth Judicial District.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. The counties of Harper, Barber and Comanche are hereby detached from the county of Reno for judicial purposes, and are hereby attached to and made a part of the Ninth Judicial District.

SEC. 2. Terms of court shall be held in the county of Harper on the second Tuesday of July and November of each year; in the county of Barber on the third Tuesday of July and November of each year; and in the county of Comanche on the first Tuesday of July and December of each year.

SEC. 3. This act shall take effect and be in force from and after its publication in the *Kansas Farmer*.

Approved March 9, 1874.

There was a brotherly harmony, delightful to contemplate, between the county officers of Comanche county and their representative at the State capital. While he was getting this act through the Legislature to make more secure the commercial advantages of the city of Smallwood, the officers at home were not idle; and while the population was so limited that its "We, the people," might have struck an observer as a representation of the proverbial tailor's convention, the officials were every whit as industrious, as enterprising and as liberal in their views concerning the people's wants as the officers of the oldest county in the world. The act, having been approved on the 9th, might reasonably be expected to get itself published on the 10th; so, the next day after its approval, Alexander Mills, acting as chairman of the county board, (as, of course, he could have acted as anything else he chose, seeing the little danger there was of a contest,) and William Allen—whether of "rag-baby" fame, we cannot know for certain—acting as county clerk, and manipulating a seal which his industry had secured for him, sat them down, either in the cabin, the "dug-out," or on the pile of chips—for it was in the city of Smallwood—and there, in that lonesome country, the undisputed domain of "the Cheyenne and the coyote, the wolf and the Arapahoes," signed, sealed and delivered to some mortal being, who was, doubtless, eager to get away, seventy-two as handsome bonds as any county could boast. Their labors were concluded, and the organization of Comanche county arose *en masse* and journeyed toward the setting sun, and the place that knew them, knew them no more forever. But, alas for the schemes, not only of mice and men, but of county organ-

izers as well! the act that was to make the organization sound, and "warranted to keep in any climate," was "crowded out," and did not get itself published till March 11th—the day after the bonds had been issued! And this particular act itself provides that it shall only "take effect and *be in force* from and after its publication in the *Kansas Farmer*." (And see State constitution, art. 2, sec. 19.)

But let us return to the decision of the Supreme Court of the State. At the same term at which the Pawnee county case was decided, the opinion in the case of *The State, ex rel. the Attorney General, v. Board of County Commissioners of Ford County* was also announced; and it was there held, that under the act for the organization of new counties—

"None but ministerial power is exercised by the Governor, or by any other officer, in the organization of a new county. When the memorial is presented to the Governor, he appoints a census taker; the census taker takes the census of the county, and reports to the Governor. If there are six hundred or more *bona fide* inhabitants in the county, the Governor then appoints three county commissioners, a county clerk, and designates a place for the temporary county seat. The officers thus appointed then qualify and proceed to the discharge of their respective duties; and the county thus becomes organized by these proceedings, and by operation of law. It requires no proclamation from the Governor; and every act that he performs might constitutionally be conferred upon any other officer. Therefore, the acts of the Governor, and the acts of the other officers, in the organization of new counties, being merely ministerial acts, must be in substantial conformity to law, or they are void, and the courts may declare them void. And therefore the proceedings in this case, [a fraudulent memorial, census, etc.,] in attempting to organize said county, being in violation of law, are void, and the organization is void, and the court has the right to declare it to be void."

It was further decided, that an act providing for terms of court would not always cure a fraudulent organization; that there must be something substantial in existence to be validated before the Legislature could make it valid.

"As there was no attempt by the Legislature to establish or *create* a county organization in Ford county, and as no county organization, *de facto* or otherwise, was then in existence in Ford county, we cannot think that said recognition by the Legislature created any county organization. . . . The Legislature cannot ratify a thing that never had an existence. They cannot cure a defective or irregular organization when the organization itself never in fact existed. And the seeming recognition of a thing which never had any actual existence cannot create such a thing."

See also two later cases on the same subjects: *State v. Sil'on*, 21 Kas. 207, and *State v. Stevens* 21, id. 210.

Turning now to the opinion in *State ex rel. v. Pawnee County*, 12 Kas. 426, already cited, we shall find, on pages 439 and 440, the reasons why an act providing for terms of court ratifies an organization otherwise void; and it will be observed, that in a county with no inhabitants and no taxable property, the conditions would be precisely the same, if such an act were held a validation, as they would be in an inhabited county with taxable property were such an act held to be *not* a validation—that, in short, the reasons given in ordinary cases for holding such an act to be curative of a fraudulent, but existing, organization, are reasons for *denying* any such effect to the act set out above. The reasons were as follows:

"Now, if the county had really not been organized, there would have been no county officers, and no term of the district court could have been held in that county; there would have been no sheriff to serve writs and preserve order in the court room; no clerk of the district court to enter the proceedings of the court; no county

commissioners to furnish a room in which to hold court, nor to furnish stationery, fuel, etc., for the court, and no county attorney to prosecute and defend for the public. Besides, *where would the money have come from to pay the expenses of the court, to pay for fuel, to pay jurors' fees, etc.?* There would have been no assessors to assess property; [and here none to be assessed:] no county clerk to make out the tax list; no treasurer to collect the taxes; and who would draw the jurors, and who summon them, etc.?" [and here, where would the jury come from, with the county uninhabited?]

Opposing counsel and the learned judge below assumed that Comanche county had a full set of officers when this act was passed; but this is an unwarranted assumption. The burden of proof was upon the defendant in error to establish every fact essential to corporate existence, and the silence of the agreed statement makes against him as much as proof of the opposite fact; and the only officers it is shown the county had, elected, qualified or assuming to act, were county commissioners, a county clerk and a member of the Legislature! Had it a sheriff? a clerk of the district court? a county attorney? a county treasurer? any township officers? There was no proof that any one was assuming to exercise either of these offices. Here is all the statement of facts shows concerning the officers of the county:

"20. The only return on file in the office of the Secretary of State is a certificate of the special County Clerk of Comanche county setting forth the following:

"'County Clerk's Office, Comanche County, Kansas.

"'In pursuance of the determination of the board of county commissioners, as canvassers *ex officio* of said county, I, Henry H. Moss, clerk of said board of commissioners, do hereby certify, that the town of Smallwood received two hundred and seventy-two votes, being all the votes cast for county seat; and also that A. J. Mowry received two hundred and seventy-two votes, being all the votes cast for representative of said county, at an election held in said county on the third day of December, 1873.'"

"25. It is further agreed, that at the special election on

December 3, 1873, at which A. J. Mowry was elected member of the Legislature from Comanche county, Alexander Mills was elected a member of the board of county commissioners of that county, and William Allen, county clerk, and that at the first meeting thereafter of the board, and before the issue of the bonds in suit, Alexander Mills was chosen by said board as its chairman."

Article 10 agrees that Mills, when he signed the bonds, was acting as chairman of the county board, and article 11, that Allen was acting as county clerk. This is all that is said about county officers. True, the report of the committee of investigation, quoted in article 20, after setting out the certificate of canvass above quoted, goes on to state:

"The committee found the papers referred to to be regular on their face, and show that *prior to the elections* mentioned in their respective counties they were *regularly organized.*"

But this could only refer to the memorial, census, etc., and could not refer to the organization of the county effected by the special election of a full corps of county and township officers; for article 25 of the agreed facts shows that the very election "mentioned," and to which the report refers, was that very special election, and the "regular organization" is said to have preceded that, and could not have been other than the *temporary* organization.

I think it is safe to conclude from these premises, that it is certain that the county had not, at least up to the day these bonds were issued, become a corporation *de jure;* and that there was no such *de facto* organization as could be validiated by the act which was published the day after the bonds were issued. In connection with this branch of the case, however, the defendant in error

urges in his own behalf the fact of registration and the doctrine of the protection of *bona fide* holders, and argues in his own behalf and with his own doctrine a *reductio ad absurdum*. "Although," says he, "this corporation did not exist in law nor in fact so far as anybody else in the world is concerned, yet I am a *bona fide* holder and my bonds are registered, and, therefore, *as to me* this was a legally-organized county, and there was a subsisting corporation." This is certainly the height of the ridiculous. Suppose the plaintiff in error were a natural person sued upon a note, and his defense were that he was not born until eleven years after the date of the note, and the holder were to urge—"To be sure, as to all the rest of mankind, you were not born till several years after the note was given; but, my dear sir, consider! *I* am a *bona fide* holder, and as to *me* you were born and had come of age eleven years before your birth. This doctrine of *bona fide* holder, sir, is a great and beneficent thing—for the holder!" It is begging the question at issue; for if the corporation did not exist, there *were* no bonds to *be* registered, nor to *be* held by anybody. The State Auditor is not vested with jurisdiction in *quo warranto;* it requires a bond *issued by a subsisting corporation* to give him authority to act at all; and no man can be the *bona fide* holder of forged paper so as to enjoy the law's protection. Pray what good would it do to declare that a corporation exists *as to a certain person only?* If no corporation existed in fact, how much farther along would he be towards collection? I take it that, in considering the issue of corporation or not, we are not to consider it with reference to special persons or special things, but as a fact complete in itself; that if a corporation exists at all, it exists as to

the whole world if *de jure*, and as to the whole world but the State, if *de facto*. Hence, in considering this issue, we are to consider it precisely as if the suit was on the commonest of open accounts.

A purchaser of bonds, even with full recitals, is bound to know whether the act authorizing the bonds had, previous to their issue and the recited election, been long enough in force to permit the requisite notice of the election to be given. (*McClure v. Oxford Township*, 94 U. S. 429.) Is he not, *a fortiori*, bound to know whether the corporation itself had been in existence long enough to have permitted such notice to be given and such election to be held at the time recited? Surely, he is bound to know whether the corporate existence had begun at all, at the date the bonds purport to have been issued; and he could not ascertain that concerning a new corporation, without learning *when* it began to exist. If he must know this, then it is necessary for the plaintiff to prove in this case, not only that the county had become organized when the bonds were issued, but that it had existed in full legal vitality previous to December 31, 1873; for the election is recited to have taken place January 31, 1874, and, under either the internal-improvement act or the provisions of chapter 25 of the General Statutes, thirty days' previous notice was essential to the validity of the election. Our code, in existence long years before the date of these bonds, permitted allegations of the existence of corporations to be put in issue by sworn denial, so as to cast upon the party alleging it the burden of proving the existence of a corporation; (Code of Civil Procedure, section 108;) and such a denial was filed in this case. The burden of proof is, therefore, upon the

plaintiff, to prove that the defendant existed as a corporation at such a time in the past as would enable it to fully comply with the statutes in voting and issuing the bonds. Presumptions and estoppels are but means of proof. They do not render proof of some kind entirely unnecessary, nor shift the burden of proof. Either by presumption, by estoppel or by actual evidence, then, the plaintiff must prove that, previous to December 31, 1873, the defendant had actually got into existence as a corporate body, so as to be able to proceed under the law and issue its bonds as alleged in the plaintiff's petition. It certainly cannot be gainsaid that, unless the defendant was in full corporate vitality before December 31, 1873, it could not have given thirty days' notice of an election held January 31, 1874; nor, that, unless it existed on the 31st day of January, 1874, it could not have legally issued bonds based on an election held that day; nor, that, unless it actually existed as a corporation March 10, 1874, it could not issue valid bonds on that day, no matter if it became a corporation the day after. With this preliminary understanding of the matter in issue, let us now proceed with the inquiry whether the plaintiff has proved this indispensable fact.

To begin with, if the county had even a pretended organization, it existed only on paper, and in sham pretense; there was no organization *in fact*. The county was wholly uninhabited, and utterly destitute of taxable property; and as there was but one solitary house in the entire county, and that and a "dug-out" stable, and some chips, constituted the county seat, it is obvious that the whole county government must have lived and held their offices in that story-and-a-half log mansion. What were they

to do there in an official way? What could they have done to make apparent their official life? What business was there to transact? The county attorney could do nothing, for, without inhabitants, juries and justices of the peace were alike impossible; with nothing but public lands in the county, not an acre of which had ever been entered, and with not a dollar's worth of personal property in the whole county, pray where were the deeds and mortgages to come from, which the register was to file, or record and index? With no magistrates nor courts to issue him a process, how was the sheriff to indicate that he was officially alive? And, save to borrow money "on the credit of" a county without either inhabitants or taxable property, what could the county commissioners do? And without inhabitants to do the voting, how could they even initiate the borrowing proceedings?—for an *election* was necessary, and an *election* implies the presence of *electors*. And the county clerk—pray what was there for him to do? Is not this the test of a *de facto* county organization—that a stranger entering the county seat would perceive matters going on in the various county offices precisely as in an organized county, and, *from appearances*, would be led to suppose, without a suspicion, that he was in the county seat of a regularly organized county? Here, however, the external means of performing official acts were entirely wanting; and an express act of the Legislature, declaring the county organized, would have left the officers as officially powerless as before. The obstacle was not in defective proceedings alone, but in the surrounding circumstances—there was absolutely nothing for a county organization to do, but to sit down and wait "to grow up with the coun-

try." Hence, the case falls within *the principle* of the decision in *The State ex rel. v. Commissioners of Ford County*, 12 Kas. 441–446, and even the most explicit legislative recognition could have been of no avail. (See, also, *Barkeley v. Levee Commissioners et al.*, 93 U. S. 258, where a legislative recognition was held unavailing because evidently the result of a false suggestion.) There was, then, no *de facto* organization to be validated, and legislative recognition is, therefore, immaterial.

But, even in case of a merely defective organization existing in fact, it requires *legislative* recognition to cure the defect; and it has that effect only because the *Legislature* has power to organize counties in any manner it may choose—even by special act; and what it can do in the first instance, it can ratify when done. The power of ratification, however, is lodged in the same body as the power to create; and *one house* of the Legislature, acting alone, can no more validate a county organization than it can create one in the first instance. It is true, that in *The State ex rel. v. Stevens et al.*, 21 Kas. 210, the court mentions the circumstance that the House admitted a member from the county; but its attention was not called to the point, and its decision was not based upon it, but upon an act authorizing the county to issue bonds. Certainly, no court would deliberately decide that the House of Representatives alone can organize a county, or ratify a defective county organization. Now, it is true, that in this case it appears the House admitted a member from Comanche county, in January, 1874; that he sat throughout the regular session; that he voted for a United States Senator, and introduced a bill, which was read the first time; and that, upon reference for investi-

gation, a committee of the House reported in his favor, and declared there was no evidence the county had been fraudulently organized. But each house is the exclusive judge of the election and qualifications of its own members; so that with none of the proceedings, even to the committee's report concerning Mowry's right to a seat *in the House*, could the Senate or the Governor have had anything whatever to do—they were excluded by the constitution from all interference. When a United States Senator is to be voted for, this rule still applies, and each house must determine for itself alone who are the members of that house—the Senate cannot challenge the vote of a Representative the House has admitted. Besides, when convened for the election of a Senator, the two houses do not constitute a Legislature, but become a distinct body created for that special purpose. Can the two houses, when so convened, legislate? Can they create a county organization? If not, neither can they ratify one already created; for the power to ratify depends upon power to create, and is inseparable from it. The introduction of a bill and reading it the first time was, likewise, the act *of the House alone.* Hence, as the House alone had no legislative power, none of these proceedings constituted a *legislative* recognition; and as only the *Legislature* could validate a defective organization, these proceedings may be laid out of the case.

If, then, there ever was any legislative recognition of this organization, it could have been only the passage of the act providing for the holding of terms of the district court in Comanche county. But this act was not published, and, therefore, did not take effect, until March 11,

1874, while the bonds were alleged to have been issued March 10, 1874—the day before. Until published, it was as if it had never been passed. If we could go back to the date of *approval*, the plaintiff might have fared better in *McClure v. Oxford Township*, 94 U. S. 429. Hence, until the day after these bonds were issued, there had certainly been no legislative recognition of the county organization.

Did that act have a retrospective effect? If so, why? Back to what time or proceeding did it relate? Did it validate bonds illegally issued in the meantime? "Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. (*United States v. Heth*, 3 Cranch, 398–413.) "Such is the settled doctrine of this court." (*Chew Heong v. United States*, 112 U. S. 536–559.) "As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary implication. Without such command or implication they speak and operate on the future only." (*Murray v. Gibson*, 15 How. 421–423.) "It is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears." (*McEwen v. Den*, 24 How. 242–244; *Harvey v. Tyler*, 2 Wall. 328–347; *Sohn v. Watterson*, 18 Wall. 596–599.) "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate

is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." (*Twenty per cent. Cases*, 20 Wall. 179–187.) How, under such a rule, can any retrospective operation be given to the act relied upon in this case?

Here is nothing requiring an organization of the county at any time previous to the act itself; nor, indeed, even at that date, for nothing was to be done under the act, so far as Comanche county was concerned, until the first Tuesday in July, 1874—*four months after the publication of the act;* and it would have sufficed had the county been organized at any time within that interval of four months. It is common practice for the Legislature to provide for terms of court in the organized counties of a district, and then provide that court shall be held in the unorganized counties at such times after their organization as the judge of the district may order; and, at its last session, the Legislature, in the case of Wallace county, even fixed *the time* for holding the terms of court, thus; "In the county of Wallace, on the fourth Monday in April and the fourth Monday in October, *after the same shall be declared organized.*" The effect of this act is not a question of local law, but one of the general common law as to the construction of statutes, and, in such a case,

this court is to follow its own decisions, or its own independent views, in the absence of such decisions, rather than the decisions of the State court. When these bonds were issued there had yet been no decision whatever of this question by the Supreme Court of Kansas. But, in any event, the farthest that court has gone in the direction of holding that such an act will validate a *de facto* county organization existing at the time, but defective or fraudulent, is this: "We think the recognition by the Legislature of said *de facto* organization had the effect to make such organization valid, *at least from and after such recognition.*" (*The State ex rel. v. Commissioners of Pawnee County*, 12 Kas. 426–439.) And, under the rule as to retrospection, no court can go further than that. But that will not avail in this case; for then there was no organization the day before—the day these bonds were issued. The question as to the effect of validation upon previous contracts has never been decided by the State Supreme Court.

But, surely, should it appear from the public records that bonds were issued less than thirty days after the organization of the county, they must be void, even in an innocent holder's hands! Is not a purchaser bound to know whether the county has been organized *at all?* How is he to know that but by investigation—by due inquiry at the proper place? If he is bound to know whether the county has been organized at all, then he is chargeable with notice of the precise date of its organization; for "every man is chargeable with notice of that which the law requires him to know, *and of that which*, after being put upon inquiry, *he might have* ascertained by the exercise of reasonable diligence." (*McClure v. Town-*

ship of Oxford, 94 U. S. 429–432.) In short, being bound to know a given fact, he is chargeable with knowledge of not only that ultimate fact, but of every other intermediate or collateral fact which actual inquiry at the proper sources of information, concerning the ultimate fact, would necessarily have disclosed. To ascertain whether the county had been organized, the plaintiff must have gone first to the Governor's records, then to the county itself—for the Governor's action but made organization possible; it did not effect the organization itself. Once in the county, all else would have stood self-revealed—there was no organization visible there, nor even possible under such conditions. He would have found that on the 31st day of January, 1874, no bond election could have been held in the county. What he would have learned upon such investigation, the law presumes he actually knows; and, hence, he knows too much to be able to enforce these bonds.

But we are not yet at our journey's end. This act, providing only for terms of court four months in the future, must have validated, not only the county organization itself, *but these bonds* as well; for if there was no valid organization until that act went into effect, the bonds, when issued, were necessarily invalid, and might as well have been signed and issued by any other two men anywhere; and merely validating the organization would not have validated all its intermediate acts. (*Hazeltine v. Hewitt*, 61 Wis. 121.) And all this must have been the result of an act which was not *intended* to validate even the organization! Can retrospective construction, and that, too, based on a mere implication—not upon an express statute—be lawfully carried so far? And, again:

Could the Legislature have validated these bonds, which, when issued, were no county charge at all, but were absolutely void for want of power? (See *Commissioners of Shawnee County v. Carter*, 2 Kas. 115–128, decided long years before this transaction took place.)

This county, then, was not legally organized under the general law, but it was void. No *de facto* organization existed, so as to be validated; but, if so, the proceedings of the House alone could not validate it; and the act fixing times for terms of court, not being retrospective, came too late to save these bonds, even if it could have validated the bonds by validating the organization. As these are the only modes by which the organization could have become valid, it follows that it was and remained illegal, and powerless to issue bonds, unless the doctrine of estoppel, as to *de facto* corporations, can aid the plaintiff.

Where a corporation bearing all the outward appearances of a corporate organization, and assuming to be such, has existed in a community for a long time, so that no indication would lead one to question its corporate existence; and it has existed so long as to have become the nucleus of varied interests; the attempt to incorporate was made in good faith, and with the honest intention of becoming incorporated, and the defects in the proceedings consist of acts or omissions not apparent to those dealing with the association, but which search and investigation into the past alone can reveal; and the State has never interfered, then, and only then, the doctrine of estoppel applies, and neither the association nor those dealing with it can question the corporate existence. "The authorities upon questions of this kind are mainly in cases where the incorporation was by special charter.

There the charter, with proof of acts of user under the harter, has almost uniformly been held sufficient as against any collateral inquiry; (Angell & Ames on Corp., §§ 91–94, 635, and cases cited in notes;) and we suppose the same principle obtains in incorporations organized under a general law. There must, in such cases, be a law under which the incorporation can be had. There must also be an attempt, *in good faith*, on the part of the corporators, to incorporate under such law; and when, after this, there has been, *for a series of years*, an actual, OPEN AND NOTORIOUS exercise, unchallenged by the State, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action." (*Pape v. Capitol Bank*, 20 Kas. 440–445.) The *thing* itself must exist beyond all question, the only question being as to its legal character. A *de facto* corporation cannot exist on paper; a legal one may. A *de facto* corporation must manifest itself to the senses through an actual organization; and the proper test in this case would be this: If a stranger going to Comanche county on or before the 10th day of March, 1874, would have found at the place called "Smallwood" such open appearances of county organization in operation as might have induced him reasonably to honestly believe the county was organized, the appearances being those usual to the public offices at the county seat of an organized county, such as county offices open, with persons in possession discharging the ordinary duties pertaining to those offices — everything going on, in fact, as things do at the usual county seat — then Comanche county was so situated as to make possible the application of the *de-facto*-corporation doctrine.

But this alone would not be enough; there must not only be such a visible appearance of organization, but there must have been an attempt, *in good faith*, to lawfully create the corporation under the general law—and it is not pretended there was any such attempt made here in good faith. The only act of this alleged corporation was the issuing of these bonds; and it is settled law that the instance in controversy will not alone be sufficient corporate action to prove a corporation *de facto*.

2. *That if there was a valid county organization when these bonds were issued, and they were regularly and legally issued, the plaintiff cannot recover in this action, because the defendant is not the same corporation.*

The Legislature of 1875, having received the report of the commissioners to investigate the fraud which had been perpetrated, at the session of 1876 provision was made for the administration of the laws within the county, precisely as in other unorganized counties; and from that time until 1885, Comanche county was constantly treated as an unorganized county.

By section 2 of chapter 69 of the Session Laws of 1876, it was enacted: " . . . the county of Comanche is hereby attached to the county of Pawnee for judicial purposes;" and by section 4 of chapter 99 of the Session Laws of 1881: "The county of Comanche is hereby detached from the county of Pawnee, and, *until organized*, shall be attached to the county of Barbour for judicial purposes; and all actions, both civil and criminal, now pending in the district court of Pawnee county, and arising in the county of Comanche, are hereby ordered to be certified to the county of Barbour, and there to be tried and proceeded with the same as though said county

had been originally attached to the county of Barbour." Section 2 of the same chapter provides: "Terms of court shall be held . . . in the counties of Comanche, Clark, Lane, Buffalo, Foote, Meade, Seward, Arapahoe, Sequoyah, Scott, Wichita, Kearney, Grant, Stevens, Kansas, Stanton, Hamilton and Greeley, *after the same shall have been organized*, at such times as the judge of the district shall order." February 27, 1885, by original proceedings under the general law concerning the organization of new counties, Comanche county was, by the Governor, duly organized in all respects as a hitherto unorganized county; and by chapter 137 of the Session Laws of 1885, approved February 27, and published March 11, 1885, the Nineteenth Judicial District was created, consisting of the counties of Sumner, Harper, Barber and Comanche, and Comanche county's terms of court fixed for the third Tuesdays of June and December.

(1) The county had no inhabitants, no taxable property, and acquired no public possessions. Even its very officers were not inhabitants of the county; and in the spring or early summer of 1874, as soon as these bonds had been issued, registered and sold, every one of the county officers left the county, and none of them has ever returned. The Governor could have appointed a sheriff and a probate judge to fill the vacancies thus caused in those offices; but neither of these constituted officers of the municipality, but rather they were officers *of the State*, belonging to its judiciary department. He could also appoint a coroner and a county surveyor. (Gen. Stat. 1868, ch. 36, sec. 57.) No other vacancy could be filled by the Governor; but every office was vacant. "Every county office shall become vacant on the happening of either of

the following events, before the expiration of the term of such officer: . . . . *Fourth*, His ceasing to be an inhabitant of the county for which he was elected or appointed." (Gen. Stat. 1868, ch. 25, sec. 179.) The vacancy in the office of county clerk (Gen. Stat. 1868, ch. 25, sec. 42), of county treasurer (sec. 64), of register of deeds (sec. 89), could be filled only by the county commissioners. But there were no county commissioners; and a vacancy in the office of a county commissioner could be filled by only "the remaining commissioner or commissioners, together with the county clerk," (sec. 10) —and there was no remaining commissioner, no county clerk, and a county clerk himself could not be appointed until county commissioners should be appointed! A clerk of the district court (sec. 152), and a county attorney (sec. 146), could be appointed by the district judge; but these, too, were officers of the State, connected with its judiciary department, not officers of the corporation itself.

Thus matters stood in the early summer of 1874, and thus they ever after remained; and it is evident that the corporation, if it had previously existed, was utterly powerless to restore itself. With its vital organs absolutely destroyed, how could the body live? "Corporations have also been considered dissolved by the loss of all or a majority of the members of any integral part, or select body, without which they cannot transact their municipal business, unless the power of restoration is vested in the subsisting parts of the corporation." (Angell & Ames on Corporations, § 769.) "From reference to the cases which have been cited, it will be seen that the dissolution of a corporation from the loss of an integral part, whether

the head officer or a select body, results from the incapacity of the corporation, in its imperfect state, to act, or to restore itself by a new election." (*Id.*, § 770.) Such was the impotent condition of Comanche county continuously after the early summer of 1874; and only a special act of the Legislature could have restored it to life. Without legislative interference, there existed no power in any department of the State, under any law, to appoint new officers and set in motion the lapsed municipal machinery. In England, the power our Legislature possesses in this respect is vested in the Crown; and the cases of revivor in England by new Crown charters have been just such cases as would exist here were the Legislature to specially reorganize the defunct municipality. The Legislature did not interfere; but, on the contrary, clearly expressed its determination that the corporation should remain extinct; for in 1876 it attached the county, for judicial purposes, and as an unorganized county, to Pawnee county; (Laws of 1876, ch. 69, sec. 2;) and in 1881 referred to it, and provided for it, distinctly, as an unorganized county. (Laws of 1881, ch. 99, secs. 2 and 4.) The Legislature had power to disorganize the county, to dissolve it, or to even abolish it, at will; and as a recognition of a county as organized is a legislative organization, so repeated recognitions of a county as unorganized must, *a fortiori*, work its complete dissolution. This point was ruled by the Supreme Court of the State, in the recent case concerning Wallace county. (*State ex rel. v. Yoxall et al.*, in Pacific Reporter for 1888.) Hence, in actual fact, under the common law and by legislative action, Comanche county existed only as an unorganized county from the summer of 1874 till February 27, 1885

Dec. 27, 1723

—nearly eleven years—when it was organized under the general law, by the appointment of special county commissioners and a special county clerk. Was this a revivor of the extinct organization, or the creation of a distinctly new one?

(2) If the Governor's action in appointing special officers, February 27, 1885, had any legal effect whatever, if it was not absolutely without authority, then that action, when supplemented by the proceedings it was intended to initiate, created a new corporation, which must date its existence from the qualification of those special officers, and not from some time in the distant past; for the Governor's action was taken under a *general* statute, which invested him with power with reference to none but *unorganized* counties; it contemplated no such case as the revivor of a lapsed county organization which had once existed. The statute being general, so must the legislative intent have been general; and that general intent was to provide for the *original* organization of unorganized counties. We cannot say, therefore, that in authorizing what was done by the Governor in this instance, the Legislature *intended* to revive an old organization, instead of creating a *new* corporation distinct from, and independent of, every other corporation then existing, or that had ever before existed. Again, when those special officers were appointed, what were they to do? Were they to fill vacancies in the county offices? No; for until the next *general* election *vacancies* could be filled only by appointment. No law authorized a *special* election for the purpose. They were to divide the county into townships, and give thirty days' notice of an election for officers to serve till the next general election; and these were not to fill va-

cancies, but to be the pioneer officers of the *new* corporation then originally created. Finally, the special officers were appointed under the general act relating "to the organization of new counties," upon a memorial which had to be signed by householders of an "unorganized" county; and, being so appointed, the law declared concerning them that "*from and after the qualification of the officers*, appointed under this act, *the said county shall be deemed duly organized*," (Comp. Laws 1885, ch. 24, sec. 106,) which makes the existence of this corporation date from a time subsequent to February 27, 1885. The county was unorganized in fact; it had been distinctly so regarded for years by the Legislature; the Governor, assuming it to be one of the hitherto unorganized counties of the State, took the necessary steps to organize it; and on the very same day approved the act creating the Nineteenth Judicial District, which was published March 11, 1885, and which provided for holding terms of court in Comanche county; (Session Laws 1885, ch. 137, secs. 1 and 2;) while a few days later the Legislature attached Clark and Meade counties to Comanche for judicial purposes, (*Id.*, ch. 119, sec. 2,) thus clearly recognizing the validity of the Governor's action in organizing Comanche county by original proceedings as a hitherto totally unorganized county. Observe, this is not like the Crown giving a new charter to a lapsed corporation the Crown had created, as it would have been had the Legislature specially reorganized the county; but it is a case where, if the old corporation was revived, it has been done by a ministerial officer destitute of power to revive, but authorized to act only where no revivor could be possible. Hence, neither in fact, nor

by legislative intent, nor by legislative authority in any manner conferred, were the proceedings of February, 1885, a revivor of any preëxisting corporate body, but the *creation* of a *new* corporate body, having no connection nor privity with any other corporation whatsoever.

(3) And even if the issue were raised by the pleadings so as to be properly considered in this action, the plaintiff in error is not the successor of any previous corporation, but is a distinct, independent, legal entity. In the first place, the complete abandonment of the original organization, when it is considered that without inhabitants or taxable property it could not have gone on, amounted to a *surrender;* and the subseqent action of the Legislature in treating the county as unorganized amounted to an *acceptance* of that surrender. (Angell & Ames on Corporations, § 772.) If not, then the utter impossibility of self-restoration operated to dissolve the corporation; (*Id.*, §§ 769, 770;) and, at all events, the county was, and had been for at least nine years, an unorganized county, and was so treated, uniformly, by the body which had the absolute right to say whether it was organized or not—the Legislature. When it ceased to be, if it ever existed, it had no property of any character; the territory within its boundaries was all public land not subject to taxation nor to municipal charge nor control; there was no taxable property within its limits; it had no inhabitants, no public buildings, no treasury; and the defendant came into possession of nothing—not even the public records nor the seal. *Nothing* of the old organization has ever found its way to the new, and no legislative act has ever been passed recognizing any privity between them. Upon what ground, then, shall it be declared that

the defendant is the *successor* of the alleged organization of 1873–1874? In the case of *Broughton v. Pensacola*, (93 U. S. 266,) and kindred cases, the public property of the old corporation had been preserved and transferred to the new; the old corporation had long existed, and no great length of time elapsed till the successor was created; and the whole matter had been the subject of specific legislation, and the court went upon the assumed *intention* of the Legislature. Here there not only was no public property at all, but eleven years of non-existence intervened. The old corporation, if it ever existed at all, had been in operation but a few months, and in a totally uninhabited county, so there was no public business to be done; and there has been no legislation, so that no legislative intention can be discovered, save the *general* intention manifested by a general act passed years before, and which means precisely the same as to every county in the State — nothing special as to this particular county. Indeed, this case falls clearly within the principle and the reasoning of *Barkeley v. Levee Commissioners et al.*, 93 U. S. 258, which is conclusive of the point that the defendant is not liable upon these bonds, any more than if they had been issued by some other county in the State.

If the people of this county are compelled to pay these bonds, it is because of a legal fiction employed, not in aid of substantial justice, as legal fictions are supposed to be, but against it. No such rule can be applied as that when one of two innocent persons must suffer by the acts of others, he shall suffer who made it possible for the wrong to be done; for there were no people in Comanche county but the very wrongdoers themselves. Neither any taxpayer of that county, nor any predecessor of his, ever

did or refrained from doing anything whatever so as to afford ground for an estoppel. To say that the plaintiff in error is bound by recitals in bonds it never made, or by acts of the State Auditor done when it had no existence, is to divorce words altogether from the meaning they bear. There are no funds to be followed into the hands of the plaintiff in error; all there was in that county at the date of the bonds is still there, for there was nothing that could have been in any way used in paying or securing the bonds. Upon one ground, and one ground only, is it possible to put upon these people, who have suffered and are to-day suffering to build them homes upon the frontier, this burden of debt, is the legal fiction that the plaintiff in error began its existence through the fraudulent memorial presented to the Governor on the 8th of October, 1873, so that Alexander Mills and William Allen were its officers, vested with its authority to issue the bonds! And why is the plaintiff in error the same corporation? Is it because it bears the same corporate name? Suppose that in 1875 the Legislature had changed the names of counties, calling Comanche Shawnee, and Shawnee Comanche. Then the Board of County Commissioners of the county of Comanche would have managed the fiscal affairs of the populous county of which the State capital is the county seat; and would the people of that county have been obliged to pay these bonds?

It were needless to argue the matter further. Whether a successor of a previous organization or not, and whether in privity with it or not, the plaintiff in error certainly is not *the same* corporation as any existing previous to February, 1885, and *in this action*, at least, that ends the controversy; for it is both physically and legally impossible

that *the plaintiff in error*, first coming into existence in 1885, could have issued bonds in 1874; and that it did do that is the sole ground upon which the defendant in error bases his present case.

G. C. CLEMENS AND H. A. SMITH,
Counsel for Plaintiff in Error.

APPENDIX.

CHAPTER LXVIII.

BRIDGE AND IMPROVEMENT BONDS.

AN ACT to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That the board of county commissioners of any county, the mayor and common council of any incorporated city, and the trustee, clerk and treasurer of any municipal township, in this state, are hereby empowered to issue the bonds of such county, city or township, in any sum necessary, not greater than ten per cent., inclusive of all other bonded indebtedness, of the taxable property of such county, city or township, for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto, or the taking of stock therein, or for other works of internal improvement: *Provided*, That all counties may issue in addition to the amount authorized by this section, bonds not to exceed one hundred thousand dollars; and all counties having property of an assessed valuation of three million dollars or more may issue, in addition thereto, two hundred thousand dollars: *Provided further*, That under a proposal for aid to any railroad, any township having less than two hundred thousand dollars taxable property may issue, in addition to the ten per cent. authorized in this section, ten per centum of an amount equal to the number of miles of railroad (agreed under such proposal to be constructed within such township) multiplied by six thousand: *Provided further*, That the limit prescribed in this section shall not apply and be considered to restrict or prevent the issuing of any bonds heretofore voted, or vote now pending, in any county or township in this state, and which bonds may not have yet been issued, but that the limit herein shall only be considered as applying only to the issuing of bonds to be hereafter voted under this law.

SEC. 2. Such bonds shall be issued in denominations of not less than one hundred dollars, and shall be payable at such place in the city of New York as the officers issuing the same may direct, in not

less than five nor more than thirty years from the date thereof, with interest not to exceed ten per centum per annum, all in the discretion of the officers issuing the same, which said interest shall be payable semi-annually, at such place where the principal sum is made payable, and for which said interest, said bonds shall have coupons attached; such bonds, if issued by a county, shall be signed by the chairman of the board of county commissioners, and attested by the county clerk; if issued by a city, shall be signed by the mayor and attested by the city clerk, and if issued by a township, shall be signed by the township trustee, and attested by the township clerk.

SEC. 3. Before any bonds shall be issued, as herein provided, the same shall be ordered by a vote of the qualified electors of such county, city or township.

SEC. 4. When a petition, signed by at least one-fifth of the voters of any county, incorporated city or municipal township, said one-fifth to be determined by reference to the returns of the last preceding general elections, shall be presented to the board of county commissioners of such county, the mayor and common council of such city, or the trustee, clerk and treasurer of such municipal township, asking that a vote be taken upon the question of building a bridge, or in aid of the construction of a railroad, or water power, by donation thereto, or by the taking of stock therein, or for other works of internal improvement, such officers shall, within ten days after the presentation of such petition, call an election, to be held within thirty days thereafter, in such county, city, or township, and shall give notice of such election by publication, for at least three consecutive weeks, in each newspaper published in such county, city, or township, if any be published therein, and if none be published therein, by posting up written or printed notices, in at least five public places in each voting precinct in such county, city, or township, for at least twenty days preceding such election, which notice shall set forth the time and place of holding such election, the bridge proposed to be built, and for which bonds are to be voted, or the railroad, or water power, in the construction of which it is proposed to aid; whether such aid is to be by donation thereto, or the taking of stock therein, or other work of internal improvement, and for which bonds are to be voted: *Provided*, That a second special election upon any question or proposition under the provisions of this act may and shall be had upon a petition of two-fifths of the legal voters of said county, city, or township, and such question or proposition shall not again be submitted excepting at the spring or fall general election and upon the petition and notice herein first provided for.

SEC. 5. Such election shall be held at the usual places of holding elections in any such county, city, or township, and shall be conducted by the officers or persons provided by law for the holding of elections in any county, city, or township in this state; such election to be in all

respects governed, and the result declared according to the rules and regulations provided by law for holding elections in any such county, city, or township.

SEC. 6. The vote at such election shall be by ballot; the tickets having written or printed thereon the words "for the bridge and bonds," or "against the bridge and bonds," or "for the railroad donation and bonds," or "against the railroad donation and bonds," or "for the railroad stock and bonds," or "against the railroad stock and bonds," or for or against other works of internal improvement, as the case may be.

SEC. 7. All persons, qualified voters, at any general election held under the laws of this state, shall be entitled to vote at such election.

SEC. 8. Whenever any two counties, cities or townships are separated by a stream of water, which it is desirable to bridge, such counties, cities or townships may join in the construction of the same, and the officers aforesaid of such counties, cities or townships shall determine the proportionate share of bonds to be issued by each, and each county, city or township shall bear the same proportionate expense and cost of constructing and maintaining said bridge, and, if the same be a toll bridge, shall receive the same proportion of tolls collected therefrom; but each county, city or township shall vote separately on the issuing of bonds.

SEC. 9. If a majority of the votes cast at any such election be in favor of the proposition and the issuing of bonds, then the officers of such county, city or township, if the proposition be for the building of a bridge, or for other works of internal improvement, except railroads, for which bonds were voted, shall, without delay, give notice, by publication in some newspaper of general circulation, published in the county, for at least twenty days, or, if there be no such newspaper published in such county, such notice shall be given by posting up written or printed notices for the same length of time, in at least three public places in the county, city or township wherein such bridge is to be built, or other work of internal improvement as aforesaid is to be constructed, and by giving such other notice as such officers may direct, that sealed proposals will be received until a certain hour of a day named in such notices, not to exceed thirty days thereafter, for the building of such bridge or the construction of such other work of internal improvement, which notices shall set forth the location of the proposed bridge, or other work of internal improvement, with such particularity that an inspection of the premises may be had without difficulty; proposals for the building of any such bridge, or other work of internal improvement shall be accompanied with complete plans and specifications of the same; the price to be charged therefor in the bonds of such county, city or township at par value; together with a bond or undertaking with good and sufficient security in double the amount of the proposed cost thereof, condi-

tioned for the faithful execution of the work proposed, and the carrying into effect of any contract made in reference thereto. That if the proposition voted for be to aid in the construction of a railroad (either by donation thereto or the taking of stock therein) or other work of internal improvement, then the proper officers of such county, city or township shall at once subscribe upon the books of such railroad, specifically setting forth the conditions upon which such subscription is made, the amount of such donation thereto, stock taken therein or bonds voted therefor.

SEC. 10. The said officers of any county, city or township are hereby fully authorized and empowered to enter into any and all contracts necessary to carry into effect the provisions of this act.

SEC. 11. That if the proposition for which bonds were voted be to aid in the construction of a railroad, or any bridge or other work of internal improvement, either by donation thereto or the taking of stock therein, then upon the subscription being made therefor, as hereinbefore provided, the officers of such county, city or township [shall thereupon issue the bonds of such county, city or township] for the amount of such subscription, and shall forthwith deliver the same, together with the original, or a copy of the subscription, setting forth its terms in full to the treasurer of state, which said bonds shall be held by the said treasurer of state in escrow until the conditions in the terms of the said subscription to such railroad or other work of internal improvement shall be in all things fully complied with; that upon the conditions of the said subscription being in all things fully complied with, then the treasurer of state shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided: *Provided*, That such bonds shall not bear interest or be negotiable until after the delivery and registration thereof: *And provided further*, That in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be by the said treasurer of state canceled, and redelivered to the county, city or township issuing the bonds: *And provided further*, That this section shall not apply where the people may have named some party as trustee in their vote on the proposition, and the contractor may thereafter agree to the same.

SEC. 12. The officers of any county, city or township issuing such bonds shall make registration thereof in a book to be kept for that purpose, showing the date, amount, number, maturity, and rate of interest of such bonds, and if issued for the building of a bridge, what bridge; or, if to aid in the construction of a railroad or other work of internal improvement, of what railroad or other work of internal improvement, and whether the same be a donation or for stock therein, and shall at the time of the issuing of the same, make out and transmit to the auditor of state a certified statement of the number, amount and character of the bonds so issued, to whom issued

and for what purpose, which statement shall be attested by the clerk of the county, city or township issuing the same, together with the corporate seal of such county, city or township, if any such there be.

SEC. 13. It shall be the duty of the clerk of each county, city or township in this state, within sixty days from the taking effect of this act, and thereafter on the first day of January and July of each year, and at such other times as the auditor of the state may request, to make out, certify and transmit to the auditor of state a full and complete statement of the bonded indebtedness of every description of such county, city and township at the date of such statement, particularly setting forth the nature of such bonds, and for what the same were issued. Then the auditor of state, upon the receipt of any such statement, shall, in a book, to be by him kept for that purpose, make a faithful record of the bonded indebtedness of the several counties, cities and townships in this state, and shall note therein all bonds subsequently issued, paid or canceled, as the same may be reported to him as aforesaid.

SEC. 14. Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the auditor of state for registration, and the auditor shall, upon being satisfied that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued; that the signatures thereto are genuine, and that such bonds have been registered in his office according to law, for which registration and certificate, the auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof.

SEC. 15. That the holder of bonds heretofore issued, or that may hereafter be issued, in pursuance of any contract heretofore made, under any law of this state, may have the benefits of this act by having such bonds registered in the office of said auditor of state as provided herein for the registration of bonds [issued] by virtue hereof. It shall be the duty of the auditor of state, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds.

SEC. 16. The auditor of state, shall, annually, on or before the fifteenth day of August, in each year, ascertain the amount of interest accrued and to accrue before the tax for the next succeeding year shall be levied and collected, (for the final redemption of the same,) upon all bonds registered in his office, and shall certify the amount

thereof to the clerk of the county in which such bonds were issued, specifically setting forth the amount thus due, and whether from the county, or a particular city or township therein: *Provided, however*, That no tax shall be levied for the creation of a sinking fund until one-half of the time for which the bonds were issued has expired: *And provided further*, That this shall not be construed as to prevent any county to levy a tax for a sinking fund if the board of county commissioners so desire.

SEC. 17. The clerk of any county, upon receiving such certified statement from the auditor of state, shall proceed to a certain from the assessment roll of the county the amount of taxable property in such county, city or township, and what percentage is required to be levied thereon to pay the said interest and to create a sinking fund in compliance with the certificate of the said auditor; and when so ascertained, shall levy such percentage upon the taxable property of such county, city or township, and shall place the same upon the tax roll of the county in a separate column or columns, designating the purpose for which said taxes are levied, and the said taxes shall be collected by the county treasurer in the same manner that other taxes are collected.

SEC. 18. The county treasurer of each county in this state shall, at the time of making his settlements with the state treasurer in each year, as may be provided by law, pay over to the state treasurer all moneys collected under and in pursuance of the provisions of this act, and shall take the state treasurer's duplicate receipt therefor, one copy of which shall be filed with the auditor of state and the other retained by such county treasurer.

SEC. 19. Upon the receipt of such moneys by the state treasurer, he shall out of the same at once proceed to pay off the interest accrued upon such registered bonds; that said treasurer shall take up the coupons for all interest thus paid, which coupons shall be filed with and canceled by the auditor of state, and the auditor's receipt taken therefor, and retained by said treasurer; that the moneys thus collected and remaining in the hands of the said state treasurer, after the payment of the said interest, as herein provided, except a sufficient amount to pay the accruing interest upon such bonds for the current year, shall be retained as a sinking fund for the final redemption of such bonds, and shall be, by the said state treasurer, at once invested as follows, to wit: *First*, in redeeming the bonds of the county, city or township issuing the same; *second*, in the bonds of the State of Kansas; *third*, in the bonds of the United States: *Provided*, That the bonds thus purchased shall in all cases be purchased at the lowest market price: *Provided, however*, That no tax shall levied for the creation of a sinking fund until one-half of the time for which the bonds were issued has expired.

SEC. 20. The state shall be deemed the custodian only of the taxes

so collected, and credited to such county, city or township, and shall not be deemed in any manner liable on account of any such bond; but the tax and funds so collected shall be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until fully satisfied, and the state treasurer shall be liable on his official bond for the faithful disbursement of all moneys so collected or received by him.

SEC. 21. That when any registered bonds shall mature, the same shall be paid off by the state treasurer out of any money in his hands or under his control for that purpose, and when so paid the same shall be endorsed by the state treasurer, on the face thereof, in red ink, "canceled," together with the date of such payment, and thereupon be filed with the auditor of state, who shall enter satisfaction of such bonds in the record where the same are registered.

SEC. 22. The treasurer and auditor of state shall annually, on the thirtieth day of November of each year, publish a detailed statement of the business transacted by them during the preceding year under the provisions of this act.

SEC. 23. All laws or parts of laws of this state inconsistent with the provisions of this act are hereby repealed.

SEC. 24. This act shall take effect and be in force from and after its publication in the *Kansas Weekly Commonwealth*.

Approved March 2, 1872.

I hereby certify that the foregoing is a true and correct copy of the original enrolled bill now on file in my office, and that the same was published in the *Kansas Weekly Commonwealth* March 7, 1872.

W. H. SMALLWOOD,
Secretary of State.

OFFICE SUPREME COURT U.S.
FILED
JAN 4 1890
JAMES H. MCKENNEY,
CLERK

In the Supreme Court

OF THE UNITED STATES.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE IN THE STATE OF KANSAS, *Plaintiff in Error*,

vs.

CHARLES EDWARD LEWIS, *Defendant in Error*.

No. 1413.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

This is a suit brought to collect coupons detached from certain municipal bonds acquired by their present holder, the plaintiff below, in good faith and upon full consideration.

The question, and the only question in the case, is whether certain frauds alleged as having been committed at the inception of the issuing of the bonds and in relation to their issue, of which the holder had no actual knowledge precedent to his purchase, invalidates them in his hands, and as appendant to this question and included in it, are two questions upon which our argument shall proceed: First, Was this corporation in existence and capable of contracting at the date of the issuing of the bonds in question? Second, Were the bonds in question such bonds as might be lawfully issued, and was any precedent want of authority, or fraud or irregularity in its exercise, concluded in the holder's favor by the recitals appearing upon the face

of the bonds? All the other questions in the case, we take it, are concluded by the statement of facts appearing in the record, which were either agreed to or found upon proof at the trial.

The issues in this case, briefly collated from the pleadings, are as follows: The plaintiff alleges the making and issuing of certain bonds by Comanche County, with certain interest coupons attached, of which the plaintiff is the holder and owner, and upon which he demands judgment. The defendant denies generally the allegations of the petition, and specially denies that the county was organized at the time the bonds were issued; that, on the contrary, it was not organized until February, 1885, and denies that it ever authorized the making, issuing or delivering of the bonds.

THE COUNTY ORGANIZATION.

The Territory of Kansas, at the time of the adoption of the Act of Admission, included not only its present boundaries, but a large portion of the present State of Colorado to the summit of the Rocky Mountains. It included within its limits large Indian reservations, and a vast unoccupied public domain, out of which was subsequently carved by Congress large gifts of lands to aid in the construction of railroads. The population of Kansas was confined to a fringe of settlements along the eastern border, with scattered colonies up and down the rich alluvial bottoms of the larger rivers of the Territory. Saving these settlements, the State was a vast buffalo pasture, roamed over by still unremoved tribes of Indians that were either indigenous to its soil, or had been planted by the Government thereon from the States lying east, in pursuance of treaties. Portions of the Territory had been divided into counties which were named by those then in authority in honor of those Southern statesmen and their Northern allies who were then endeavoring to affix the institution of slavery to the

soil of the new State. The names even of these counties have long since been obliterated and are forgotten. The region west of the present limit of the State of Kansas, and including the territory now within Kansas to the hundredth principal meridian, was named the County of Arapahoe, and covered a domain considerably larger than all the New England States, with New Jersey and Delaware thrown in.

It was, therefore, well known by the constitution-makers that nearly all the territory within the defined limits of the State of Kansas would have to be divided into counties and the same organized for carrying on local governments. It was, consequently, provided in the first section of article nine of the Constitution of the State of Kansas, as follows:

"Section 1. The Legislature shall provide for organizing new counties, locating county seats and changing county lines, and no county seat shall be changed without the consent of a majority of the electors of the county, nor any county organized or the lines of any county changed so as to include an area of less than four hundred and thirty-two square miles."

The first Legislature of the State of Kansas, in compliance with this constitutional provision, on the 4th day of June, 1861, passed an act entitled, "An Act relating to the organization of new counties." This act was amended by chapter 106 of the Laws of 1872, and it was under the act as so amended that the County of Comanche was organized. Chapter 106 of the Laws of 1872 reads as follows:

"Section 1. Section 1 of an act relating to the organization of new counties is hereby amended so as to read: Section 1. When there shall be presented to the Governor a memorial, signed by forty householders, who are legal electors of the State, of any unorganized county, showing that there are six hundred inhabitants in such county, and praying that such county may be organized, accompanied by an affidavit attached to such memorial, of at least three householders of such county, showing that the signatures to such memorial are the

genuine signatures of householders of such unorganized county, and that the affiants have reason to and do believe, that there are six hundred inhabitants in such county as stated in the memorial. It shall be the duty of the Governor to appoint some competent person, who is a *bona fide* resident of the county, to take the census and ascertain the number of *bona fide* inhabitants of such unorganized county, who shall, after being duly sworn to faithfully discharge the duties of his office, proceed to take the census of such county, by ascertaining the name and age of each of the *bona fide* inhabitants of such unorganized county, who shall receive for services rendered under this section pay at the rate of three dollars per day, from the State Treasurer, upon an itemized account, verified by affidavit. The person who shall take the census as required shall return to the Governor, upon appropriate schedules, the census authorized to be taken herein, certified to be correct and true, and if it appear by such return that there are in such unorganized county at least six hundred *bona fide* inhabitants, he shall appoint three persons, who shall be recommended in the memorial hereinbefore provided for, to act as county commissioners, and a proper person to act as county clerk, to be recommended in like manner as the commissioners, and shall designature such place as he may select, centrally located, as a temporary county seat for such county, and shall commission such persons as such officers, and declare such place the temporary county seat of such county: and from and after qualification of the officers appointed under this section, the said county seat shall be deemed duly organized.

"Section 2. Section 1 of the act to which this amendatory is hereby repealed.

"Section 3. This act shall take effect and be in force from and after its publication in the *Kansas Weekly Commonwealth*.

"Approved March 1, 1872."

It is clear, to begin with, that the Legislature of Kansas was given complete and final jurisdiction of the subject. This is decided by the Supreme Court of this State in the case of the State on the relation of the *Attorney General vs. the Commissioners of Pawnee County*, 12 Kansas, 426. The Court in that case says:

"The whole power of organizing new counties

belongs in this State to the Legislature. It may provide for their organization by general laws and through the intervention of the Governor, or of any other officer, agent, commissioner or person it may choose, or it may directly organize a new county itself by special act. The provisions of article 12 of the constitution have no application to counties as counties. See *Beach vs. Leahy*, 11 Kan., 23. It may organize a county with six hundred inhabitants, or any other number, more or less than six hundred. It may organize a county whenever there shall be a sufficient number of persons to hold the county offices, and the Legislature may provide for a less number of county officers than the usual number. See *Borton vs. Buck*, 8 Kan., 308; *Leavenworth vs. State*, 5 Kan., 688."

The record in this case, (see pages 24 to 28, inclusive,) makes it apparent that whatever fraud might have actually inhered in the organization of Comanche County was, so far as the record contemplated by law is concerned, latent and undisclosed. The proceedings from the memorial to the Governor to his final proclamation, are in all respects formal and regular, and exhibit a full and studious compliance with every statutory provision. The essential facts therein asserted to exist, were, by the terms of the law, within the control of the Governor. He was not compelled to act upon a paper record. He had directly the appointment of a person whose duty it was to take the census, and who was to make his report to him, (the Governor,) and upon which report he was to proceed by the appointment of proper officers to perfect the organization of the county. If it be asserted that under these circumstances the Governor could be imposed upon, how helpless must be the position of one who is asked to become the purchaser of negotiable paper emitted by a county so organized! It cannot be presumed by any court that the Governor did not perform his full duty; neither do we think can it be collaterally questioned that the jurisdictional facts essential to the organization of this county

did exist at the time the organization was proclaimed and the first officers of the county appointed.

If the Legislature had complete and exclusive control over the organization of new counties and the methods precedent to the organization of a county pointed out by law passed by the Legislature had been complied with, then the organization was as complete, absolute and unassailable as if the Legislature exercising its omnipotence in this behalf had, by special act, duly created and organized it.

We are not contending, however, that if the Governor of the State of Kansas had been trapped and imposed upon by fraudulent representations as to the essential facts, that the organization of the county could not be set aside, provided there was no legislative ratification and no intermediate rights had accrued on the faith of the validity of the organization.

That fraudulent county organizations have been set aside, the decisions of the Supreme Court of Kansas show. See *State vs. Commissioners of Ford County*, 12 Kan., 445; *State vs. Sillon*, 21 Kan., 207.

Two propositions, however, have by decisions of the Kansas Supreme Court directly pertinent to the question now under consideration, also been clearly settled: First, That a fraudulent organization of a county, if subsequently recognized by the Legislature of the State as valid, is, notwithstanding the fraud, ratified and confirmed. Second, That an organization of a new county, valid and regular at its inception, or validated by legislative recognition, if fraudulent, remains unaffected even though such new county shall cease to possess officers, or inhabitants to hold offices. These propositions of law are pertinent to this case as applicable to two contentions of the plaintiff in error: First, That the county *was* fraudulently organized, and that the record upon which the Governor acted was fictitious and untruthful as to its representations. Second, That sub-

sequent to the issuing of these bonds, the county was abandoned and no organization maintained until 1885, when new inhabitants coming in, an attempted reorganization was made under the law relating to the creation of new counties as it then existed.

The first of these propositions involves the question as to whether a corporation ever began to exist; the second involves the proposition whether the corporation against which suit has been brought is the same corporation that issued the bonds.

As to the first proposition, we maintain that even though it be conceded—which under the evidence adduced it cannot be—that the first organization was fraudulent, both in fact and in ulterior purpose, the Legislature has cured this defect and validated such organization by a recognition declared by the Supreme Court of Kansas to be clear and sufficient to that end. By reference to the case above cited, (*State, ex rel., Attorney General vs. Commissioners of Pawnee County*, 12 Kan., 426,) it will be seen that that was an action brought in the name of the State and on the relation of its chief law officer, in the nature of *quo warranto* to set aside and annul the organization of Pawnee County as being fraudulent. By reference to the briefs of counsel in that case it will be seen that the real contention before the court was exactly the contention here, the facts in all respects identical, and the ratification therein held by the court to be sufficient to validate the organization of the county, though fraudulent in its inception, was in part the identical ratification asserted in this case. An act of the Legislature was passed establishing courts in several counties, most of them newly organized, and among others, Pawnee and Comanche. The validating act referred to is to be found in plaintiff in error's brief. (See also sections 1 and 2, Chap. 79, Laws 1873).

If that act validated a fraudulent organization in favor

of Pawnee County, then it validated a fraudulent organization in favor of Comanche County, and the decision of the court in the case cited is on all fours and completely applicable to this case. The court says in its opinion:

"Now, this action is prosecuted in the name of the State and for the benefit of the State by the Attorney General; but, as the State, through its proper agents, the Legislature, has already recognized said organization as valid and binding, and has thereby ratified the same, all other departments, officers and agents of the State must also recognize said organization as valid and binding. We suppose that no question will be raised as to whether the Legislature did recognize the organization of said county, or as to the extent of that recognition. The records of the organization of said county were regular, formal and valid upon their face. The Governor had already recognized the organization as valid and had proclaimed it to be valid and complete, and the Legislature then provided for holding terms of the district court in said county. Now, if the county had really not been organized, there would have been no county officers and no terms of the district court could have been held in that county. * * * Is it not clear beyond all question that the Legislature intended that said organization should be considered as valid and binding?"

But this act was not the only legislative validation or recognition of the organization of Comanche County before the trial court and considered by it.

By reference to the eighth clause of agreements as to facts, (on page 28 of the record), this Court will observe that it was consented upon the trial that either party might use any or all of the testimony, reports, matters, things or resolutions contained in the printed session laws, House or Senate journals or volumes of printed documents of the State of Kansas, and any of the matters and things in the deposition of the plaintiff, Charles Edward Lewis, on file herein, etc., etc.

There was, therefore, before the court upon the trial, (but not appearing upon the record here), House joint

resolution No. 1 to appoint a committee to examine into the condition of Barbour, Comanche and Harper Counties, and that resolution is as follows:

"HOUSE JOINT RESOLUTION NO. 1,

"To appoint a committee to examine the condition of Barbour, Comanche and Harper Counties.

"WHEREAS, It appears from the report of the Secretary of State, made to this House on the sixteenth day of September, A. D. 1874, that there are but six hundred and eight inhabitants in the County of Barbour, and that the County of Comanche has but six hundred and thirty-four inhabitants, and that the County of Harper has but six hundred and forty-one inhabitants; and,

"WHEREAS, It further appears from the report of the Auditor of State, made to this House on the sixteenth day of September, A. D. 1874, that the present bonded indebtedness of the County of Comanche, so far as can be ascertained at present, is seventy-two thousand dollars, and that the present bonded indebtedness of the County of Harper is forty thousand dollars, and that the present bonded indebtedness of the County of Barbour is one hundred and forty-one thousand three hundred dollars; and,

"WHEREAS, It is important that the interest of the people and the honor of the State should be protected, and in order to enable the Legislature that shall convene in January, A. D. 1875, to have the proper and necessary information for intelligent action respecting the condition of said counties; therefore,

"*Be it Enacted by the Legislature of the State of Kansas.*

"SECTION 1. That a committee of two be appointed (one by the Speaker of the House of Representatives and one by the President of the Senate), whose duty it shall be, in connection with the Attorney General, to proceed at once and fully and carefully investigate the facts in respect to the organization, present condition, financial and otherwise, and as to the number of inhabitants, of the said Counties of Barbour, Comanche and Harper, such investigation to be completed on or before the first day of December, A. D. 1874; and said commissioners shall make a full report respecting the matters hereinbefore named to the Governor, and the said report shall be submitted by the Governor to the next Legislature with his message."

A House joint resolution, under the constitution of the State of Kansas, has all the force and solemnity of a public act of the Legislature. It is adopted by the Legislature and approved by the Governor in the same manner as a law, and is a law of the State.

By the terms of this resolution, it is shown that on the 16th day of September, 1874, long after these bonds were issued, Comanche County had six hundred and thirty-four inhabitants. The bonded indebtedness of Comanche County, as recognized by the Legislature, at that time was seventy-two thousand dollars, being the bonds, beyond question, involved in this suit. This indebtedness was put in the same category as the Harper and Barbour County debts, both of which have been successfully asserted in the courts, and the Barbour County indebtedness has been upheld by the decision of this Court in the case of *Lewis vs. Barbour County*, 105 U. S., 739.

Further, there was before the court the journal of the proceedings of the Legislature for the year 1875, containing the report of the committee provided for in this joint resolution. The extracts and reference included in the agreed statement of facts and in plaintiff in error's brief are extracts and references from the minority report made by the Attorney General. A majority report was made by the other members of the committee in favor of the validity of the organization.

These last-mentioned proceedings, however, are only significant as involving a further recognition and ratification of the organization as originally made, because they occurred long subsequent to the issuing of the bonds and long subsequent to the acquirement of our rights.

The deposition of Charles Edward Lewis, which was also before the trial court, shows clearly and conclusively the absolute good faith of his purchase, and also that he had paid ninety-five cents on the dollar for these bonds. All this evidence was before the court upon the

trial of the case, as appears by the agreement of parties, and is not included in the findings.

The force and efficacy of such records as proof of facts therein appearing and asserted has been passed upon by this Court in the case of *Watkins vs. Holman*, 16 Pet., 56. This Court, in its opinion, says:

"In this country, in all public matters, the journals of Congress and of the State Legislatures are evidence, and also the reports which have been sanctioned and published by authority. This publication does not make that evidence which intrinsically is not so; but it gives, in a most authentic form, certain papers and documents. In the case under consideration, the volume of documents was offered to show the report of certain commissioners under an act of Congress confirming the title in question. Now, this original report, duly authenticated by the treasury department, to which it was made, would be evidence, and it is evidence in the published volume. The very highest authenticity attaches to these state papers published under the sanction of Congress.

"The entire case turns upon the validity of a legislative act, *quasi* judicial in its nature, declaring and determining the title to property."

All of the evidence of this character extant (and it is quite voluminous) was before the court upon the trial, and upon the whole of it, the court made its findings and conclusions as to the question of organization.

From it all, it appears that the County of Comanche as originally conceived was not all hollowness and pretense, as claimed by the plaintiff in error in his brief. The report of the Secretary of State to the Legislature, in September, 1874, showed that there were six hundred and thirty-four inhabitants in the county.

It is a part of the public history of this State that in the fall of 1874 the State was visited by a devastating cloud of grasshoppers. At the same time, the Cheyenne and Arapahoe Indians broke out of their reservations and threatened the destruction of the settlements along the frontier. Militia was organized by the Governor and sent into these various counties to protect

such settlers as chose to, and could remain, and there followed a protracted campaign against the Indians, under the regular army troops commanded by General Miles.

The desolate and abandoned condition of the county at the time the committee visited it and made its report are to be accounted for, not from the fact that the county never had any inhabitants, but from the more probable, and as we contend, the real fact that under the blight of grasshoppers and threatened danger of an Indian foray, those who had gone into the county with he real purpose of settling in it and making it their home, and who participated in its organization, had deserted their claims.

The settlement of new and frontier counties of a Western State is not begun by the building of farm houses and the making of substantial improvements. The inhabitants live in tents and dugouts for the most part for at least the first year of their residence. They also erect rude sod houses. There is no timber with which to build permanent structures. An incipient settlement of this character might be abandoned and leave behind no greater vestige of its existence than would be left by the temporary halt of a band of Indians on their journey from one hunting ground to another.

Certainly, in the winter of 1875, the Legislature of the State of Kansas, by House joint resolution No. 1, above quoted, confronted and admitted the fact that the County of Comanche had been regularly organized, and that it had incurred debts and obligations to the amount of seventy-two thousand dollars.

Whoever took up the organization where it was left off, or whoever went into the county for the purpose of reorganizing it and annulling and erasing such organization as then existed, did so with full knowledge of the facts. It was a matter of public history, and the efforts which have been made in the direction of reorganiza-

tion, therefore, are as if the first six hundred and thirty-four inhabitants referred to in the report of the Secretary of State to the Legislature, had returned to their abandoned claims and determined to plead their own fraud against the rights of their innocent creditors.

With all the facts before the court below (not printed in the record here), with the report of the committee a majority of whom found in favor of the validity of the organization of the county (the Attorney General alone reporting otherwise on his own responsibility), the court below found, as a fact, that the organization was valid and the county had authority to issue these bonds.

The finding of the court below in this respect will not be reviewed, but will be taken as conclusive and binding upon this Court. No errors were committed by the court below in the admission or exclusion of testimony. Every possible fact bearing upon the question was before the court, including the facts of record and facts not of record, and the court found necessarily that the organization of the county was complete at the time the bonds were issued, and that the bonds so issued were the obligations of the county. Therefore, such facts cannot be here controverted, in our judgment, namely: that Comanche County did have the requisite population, was regularly and lawfully organized, and was depopulated by an Indian raid, as reported by a majority of the legislative committee.

We conclude, therefore, under this head, that if the State of Kansas, by its proper law officer, cannot annul an organization thus validated, its existence cannot be collaterally brought in question by the plaintiff in error in this proceeding. See also *State, ex rel., vs. Harper County*, 21 Kan., 210; *State, ex rel., vs. Voxall*, 19 Pac. Rep., p. 723.

The second proposition of plaintiff in error involves, as we have said before, the validity of the attempted organization of 1885, under which the corporation now

claims to be acting. The case last cited is decisive of this question, in our opinion. The action in that case was similar to the Pawnee County case, and proceeded upon similar grounds. This last proceeding had a double purpose: First, To set aside the organization as fraudulent, and failing that, to annul the organization for non-user. After deciding that the legislative recognition validated this fraudulent organization, as in the Pawnee County case, the Court goes on to say:

"This act," that is the validating act, "presupposes the existence *at some prior time* of a county organization and a county tribunal that transacted county business. From August 20, 1873, to September 1, 1873, there was, at least, a *de facto* organization of the county in existence. The Governor then recognized the organization as valid and had it proclaimed to be valid and complete. Within the authority of *State vs. Pawnee County*, 12 Kan., 426, the legislative recognition of the validity of such county organization made the same valid, although the original organization was defective and fraudulent. It is contended, however, by counsel for the State, that if a *de facto* organization was instituted on the 20th day of August, 1873, it was only temporary, and that as there never was any election in the county since, and as there had not been since about September 1, 1873, up to August 5, 1878, any officer in the county, the said temporary and fraudulent organization would, in September, 1873, and the legislative recognition in 1874, have no effect to legalize or validate it."

"The reasoning is not sound. For a time, though a brief one, a *de facto* organization actually existed. The Legislature having the whole control of the matter, recognized such organization and thereby ratified it. Whatever the actual fact may be, we are bound to presume that the Legislature of 1874, having knowledge of the situation of affairs in the county, passed the act of that year with complete understanding of its consequences. The removal of officers from the county and the failure to elect officers did not blot out or destroy the organization given life by legislative recognition."

"Judge Dillon says: 'Municipal corporations may become inert or dormant, or their functions may be suspended for want of officers or of inhabitants, but dissolved when created by any act of the legislature and

once in existence they cannot be by reason of any default or abuse of powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision.' Munc. Corp., Vol. 1, Sec. 112. The same principle is applicable to counties which are *quasi* municipal corporations created by the sovereign power of the State of its own sovereign will for purposes of civil administration."

The attempted reorganization of the county, therefore, in 1885, was without warrant of law and void.

The Harper County case and the Comanche County case differ only in this: that the new residents of Harper County endeavored to get rid of their old organization by an appeal to the courts. The Comanche County residents sought to shuffle off theirs by an attempted reorganization. The effort in the last case must be as abortive and fruitless as in the first, and it is clear that those who took up and carried on the organization of Comanche County took up the suspended organization as first made and recognized by the Legislature. The mere ministerial act of the Governor cannot achieve that which the courts, under the same state of facts, are powerless to decree and adjudge.

We might say, in conclusion, that it is an open secret in Kansas, that a large majority of the counties in the State organized since the State's admission were irregularly, if not fraudulently, organized so far as the existence of essential population or property was concerned. The ruling of the Supreme Court in this case was both just and provident. If an inquiry were lawfully possible into the validity of the organization, after the same has been recognized by the Legislature, either directly by *quo warranto* proceedings, or, as in this case, collaterally as to particular acts of the municipality, widespread injury and injustice would ensue, and it would be possible to disorganize a large number of counties in any western State.

THE BONDS AND THEIR RECITALS.

There are two classes of bonds here for review. Three classes of bonds were sued upon: First, the court-house bonds; second, the bridge bonds; and third, bonds to provide for a deficit in the revenues of the county. The third class of bonds were decided adversely to the defendant in error, plaintiff below, and are not here for the court's consideration.

It is admitted that the signatures to the bonds under consideration are genuine, and that they are the signatures of the *de facto* officers of the county who, by law, are required to execute and authenticate the same.

And first as to the bridge bonds. The validity of these bridge bonds in the hands of a *bona fide* holder, it seems to us under the rulings of this Court, cannot be questioned, and needs no extended argument in support of it. Section 1 of the act of March 2, 1872—the act recited in these bonds as the source of their authority—reads as follows:

"Section 1. That the board of county commissionres of any county, the mayor and common council of any incorporated city, and the trustee, clerk and treasurer of any municipal township, in this State, are hereby empowered to issue the bonds of such county, city or township, in any sum necessary, not greater than ten per cent, inclusive of all other bonded indebtedness, of the taxable property of such county, city or township, for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto, or the taking of stock therein, or for other works of internal improvement: *Provided*, That all counties may issue in addition to the amount authorized by this section, bonds not to exceed one hundred thousand dollars; and all counties having property of an assessed valuation of three million dollars or more, may issue in addition thereto, two hundred thousand dollars: *Provided further*, That under a proposal for aid to any railroad, any township having less than two hundred thousand dollars taxable property, may issue in addition to the ten per cent authorized in this section, ten per centum of an amount equal to the number of miles of

railroad (agreed under such proposal to be constructed within such township) multiplied by six thousand: *And provided further*, That the limit prescribed in this section shall not apply and be considered to restrict or prevent the issuing of any bonds heretofore voted or vote now pending, in any county or township in this State, and which bonds may not have yet been issued, but that the limit herein shall only be considered as applying only to the issuing of bonds to be hereafter voted under this law."

There can be no question that the bonds are in the clear terms and intendment of the act, and the recital is complete and satisfactory. It recites that the bond is executed and issued in pursuance of and in accordance with an act of the Legislature of the State of Kansas, etc., and also in accordance with the vote of a majority of the qualified electors of said County of Comanche, at a special election duly and regularly held therefor on the 31st day of January, 1874. This bond was registered, as required by this act, in the office of the Auditor of State, who recites the facts which he is by law called upon to find in his certificate of registration. This bond is, therefore, brought clearly within the rule of *Lewis vs. Commissioners of Barber County*, 105 U. S., p. 739. The bond is denominated a bridge bond of the County of Comanche, recites that it was issued in pursuance of and in accordance with an act of the Legislature which authorizes the issuing of bonds upon a vote of the electors for the building of bridges, and the Auditor certifies to the genuineness of the signatures of the officers signing the same, and further recites that the same have been regularly and legally issued. It would seem that no extended citation to this Court of its own authorities would be necessary to uphold this bond as the obligation of the county.

The other series of bonds are known as court-house bonds, and are designated as "Court House Bond of the County of Comanche." This bond recites that it was issued under and in pursuance of and in accordance

with an act of the Legislature of the State of Kansas, entitled "An act relating to counties and county officers," approved February 29, 1868, and also recites that it is issued in pursuance of and in accordance with an act of the Legislature to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power or other works of internal improvement, etc., approved March 2, 1872—being the act hereinbefore referred to, and also in accordance with the vote of a majority of the qualified electors of said Comanche County at a special election duly and regularly held therefor, on the 31st day of January, 1874.

A reading of these two acts would show nothing inconsistent with their provisions so far as the submission of the proposition is concerned, and if they pursued the requirements they recite of the first act and acted in accordance with the first act mentioned—to which attention is specifically directed by being the first authority named—there can be no question as to the validity of these bonds. The recitals in this case cannot be treated as in anywise ambiguous. The reference to the act of 1872, as to an existent authority to issue such bonds, proceeds upon the hypothesis that a court house is a work of internal improvement. The Supreme Court of Kansas, while not deciding the question, has fairly indicated that a court house was a work of internal improvement. This interpretation by the highest court of the State was adopted in the case of *Burlington vs. Beasley*, 94 U. S., page 310.

The Legislature of the State of Kansas has declared them to be works of internal improvement, and puts them in the category of works of internal improvement for the purpose of issuing bonds. The first three sections of chapter 52 of the Statutes of 1868, which has never been expressly repealed, read as follows:

"CHAPTER 52.

"INTERNAL IMPROVEMENT.

"AN ACT to authorize the board of county commissioners, and the authorities of incorporated cities to issue bonds for purposes of internal improvement.

"*Be it Enacted by the Legislature of the State of Kansas:*

"SECTION 1. That the board of county commissioners and authorities of incorpated cities are hereby empowered to issue the bonds of the county or city, as the case may be, for any sum necessary, and negotiate a loan thereon, for the purpose of building bridges and erecting buildings for public purposes: *Provided*, Such bonds shall not draw a greater amount of interest than ten per cent per annum: *And provided further*, That before such bonds shall be issued, the same shall be ordered by a vote of a majority of the voters of the county or city voting at an election held for that purpose, as hereinafter provided.

SEC. 2. The bonds herein provided for shall be issued in sums of not less than one hundred dollars, payable (in the discretion of the board of county commissioners or authorities issuing the same) in not less than ten years nor more than twenty years from the date thereof, with interest annually or semi-annually; said bonds to be made payable at any point or place, discretionary with the authorities issuing the same, and shall have coupons attached. (As amended by act approved February 26, 1867. Published May 27, 1867).

SEC. 3. Before issuing any bonds under the provisions of this act the question of constructing any particular improvement or building shall be submitted to a vote of the people thereof, at a time and place to be fixed by the commissioners or the authorities aforesaid: *Provided*, A petition shall be presented to them, signed by not less than fifty voters, asking a vote on the question. Upon such petition being presented, they shall within five days thereafter, give notice, by publication in a newspaper of general circulation in the county or city, of the time and place of holding such election; and the same shall be conducted under the general election laws of this State; and those voting in favor of the improvement proposed, shall have written or printed in (on) their ballots, "For the bonds," and those opposed, "Against the bonds;" and if a majority voting at such election shall be in favor of such bonds, then said commissioners or city authorities may issue the same, as provided in this act."

Section four of the same act provides for the levy and

collection of a tax to pay such bonds and create a sinking fund. Section five provides for the investment of the sinking fund. Section six provides for the payment of interest. Section seven provides that the county clerk is authorized to obtain blank bonds with suitable devices, etc. Section eight relates to the application of the proceeds of the bonds. Section nine relates to the collection of rents from public buildings. Section ten provides for the registration of the bonds in the county. Section eleven confers authority to enter into contract and pledges the credit of the county for the redemption of bonds issued under the provisions of the act, and section twelve provides for the act taking effect from and after its publication.

Now, one of two things is true: Either the act of March 2, 1872, is a substituted authority for the authority conferred in chapter 52 of the Laws of 1868 and impliedly repeals the latter law, or chapter 52 is an independent source of authority outside of the two acts recited in the bonds. In either case, the Legislature of the State of Kansas has dealt with, treated, denominated and defined public buildings as works of internal improvement. Whether they be works of internal improvement or not makes no difference, provided the Legislature has used the words "works of internal improvement" as the correlative of public buildings. If the legislative authority of the State has so legislated as to leave it undeniable that when they use the words "works of internal improvement" they mean to include court houses and other public buildings, then it is idle to discuss the question as to whether, either in the broad or technical sense, court houses are "works of internal improvement" or not. So, when they provide for the issuing of bonds under the act of 1872 for railroads and bridges and other works of internal improvement, court houses come within the fair and reasonable intendment of such act and such bonds are registrable. Or, if that be not true, then an

act is in existence where simply by the petition of fifty voters, the question of issuing bonds for public buildings may be submitted to an election, and a majority of the electors may authorize the issuing of the bonds. Therefore all of the argument to be drawn from the assumption of an essential difference between the requirements of the two acts recited in the court-house bonds falls to the ground, for here is a simple act, involving no prerequisite condition except the petition of fifty voters and a majority vote.

These bonds might be issued, therefore, under the three acts hereinbefore referred to: Either the act entitled, "An Act relating to counties and county officers," approved February 29, 1868; or, "An Act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2, 1872; or chapter 52 of the Revised Statues of 1868, entitled, "An Act to authorize the board of county commissioners and the authorities of incorporated cities to issue bonds for purposes of internal improvement."

The authority conferred by the first section of chapter 52 is a power to issue bonds of the county or city (as the case may be) in any sum necessary, and to negotiate a loan thereon. It is a power to issue bonds, not a power implied or inferred from a general authority to borrow money for a specific purpose.

We submit that the cases of *Scipio vs. Wright*, 101 U. S., 665, and *Thompson vs. Perrine*, 103 U. S., 806, make no rule of limitation upon such authority, and are inapplicable to a bond issued under it.

Chapter 52 is printed in the Compiled Laws of Kansas

for the year 1889, as amended by subsequent acts, as an unrepealed statute, and is doubtless still in force.

We are not seeking, and we have no absolute need to bring these bonds under the protection of the registration act. If they shall be held to be within the act of 1872, then the law in respect to registration has been complied with, and they are negotiable instruments within the meaning and requirements of that act.

Under the decisions of this Court, the finding of the Auditor of State can have no greater force than the recitals, and no greater force is in any sense requisite. Proper recitals have been uniformly held by this Court to be judicially conclusive in favor of a *bona fide* holder. Registration can do no more; the Court meant that registration should do no more. But it does as much as to all the facts which the Auditor of State is by law required to find precedent to the act of registration. In the case of *Lewis vs. Commissioners of Barbour County* his decision was held to be conclusive, not of facts antecedent to the issue of the bonds, but of a condition subsequent, namely: the placing of the bonds in escrow with the Treasurer of State. But he was none the less required to find that the conditions precedent as well as the conditions subsequent to the issue of the bonds had been complied with at the time he gave his official sanction to the bonds by registration, and the certification of the facts he was by law required to certify to.

Our argument, therefore, is that if these bonds are registrable, then the law has been in all respects complied with, and there is a judicial finding upon the part of the Auditor that the bonds have been issued in accordance with law. Such finding supplements and gives added solemnity and force to the recitals. If the bonds be not registrable, then court below has found that a corporation, by its proper officers, has issued them and such officers have recited that in so doing they have acted in pursuance of and in conformity to law. In

either case, the *bona fide* holder is completely protected.

The ruling in *Bissell vs. Spring Valley Township*, 110 U. S., can, according to our view, have no bearing upon this case in any of its aspects.

The drift and general purport of the decisions of this Court, made in furtherance of justice and for the prevention of wrong, is that if a corporation recite an authority in existence at the time of issuing the bonds, and further recites a compliance with a lawful condition precedent necessary to the exercise of that authority in the form of an executed negotiable instrument, that the purchaser of such instrument need look no further; that he may safely invest his money in such security, relying upon the law of the land as expounded by just and learned courts that municipalities will not be permitted to come in and show a state of facts contrary to those recited, and thus be permitted to be the abettors of spoliation. It might well be, and is probably the case in this instance, that the act of 1872 was referred to as a source of authority merely. Certainly, taking the words in juxtaposition, the recitals clearly declare that the bond is issued in accordance with and in pursuance of an act relating to counties and county officers, approved February 29, 1868. If the holder of these bonds may not—as he perhaps honestly thought he could—rely absolutely upon the recital of the Auditor of State in his certificate of registration by reason of the fact that a court house is not a work of internal improvement and that bonds might not be issued therefor under the act of 1872 and were, therefore, not registrable, the presence of that certificate upon his bonds, made by one of the principal executive officers of the State, accentuates in a very high degree the wrong and outrage and infamy that would be perpetrated if it might now be asserted that by reason of the fraudulent organization of the county, the instruments in his hands were merely pieces of waste paper, as contended for by plaintiff in error here. But the misrecital

of such source of authority may not be availed of by the plaintiff in error if authority existed at the time the bonds were issued to issue the bonds and was lawfully pursued. See the decision in *Johnson County vs. January*, 94 U. S., page 202. The court in that case says:

"The bonds recite that they were issued in conformity to law and in pursuance of an election held on the sixth of April, 1869. It is true that they refer to the wrong statute, but *falsa demonstratio non nocet*. The bad here does not hurt the good. The act of the commissioners was the act of the county, and the county is conclusively bound by what they have done. As between the county and a *bona fide* holder, no question involving the infirmity of the security can be raised."

The decisions of this Court are uniform and consistent with reference to the principle here contended for.

An effort has been made, (which we shall presently notice), to bring this bond within the few exceptions notable in the decisions of the court, but we content ourselves with asserting now that in our honest judgment the case of this bond does not come within any of the decided exceptions.

We herewith append a few of the authorities upon this point.

Knox Co. vs. Aspinwall, 21 How., 539.
Bissell vs. Jeffersonville, 24 Howard, 287.
Marcy vs. Township of Oswego, 92 U. S., 637.
Town of Coloma vs. Eaves, 92 U. S., 484.
Moran vs. Miami Co., 2 Black, 732.
Mercer Co. vs. Hackett, 1 Wall., 83.
Supervisors vs. Schenck, 5 Wall., 784.
Mayor vs. Muscatine, 1 Wall., 384.
Van Hostrop vs. Madison City, 1 Wall., 291.
St. Joseph's Township vs. Rogers, 16 Wall., 644.
Humboldt Township vs. Long, 92 U. S., 642.
Roberts vs. Bolles. 101 U. S., 119.
Brooklyn vs. Insurance Co., 99 U. S., 362.
Township of Rock Creek vs. Strong, 96 U. S., 271.

Town of Venice vs. Murdock, 92 U. S., 276.
Converse vs. City of Fort Scott, 92 U. S., 503.
Township of Burlington vs. Beasley, 94 U. S., 310.
Leavenworth Co. vs. Barnes, 94 U. S., 70.
Commissioners of Johnson Co. vs. Thayer, 94 U. S., 631.
Commissioners of Marion Co. vs. Clark, 94 U. S., 278.
Town of East Lincoln vs. Davenport, 94 U. S., 801.
Clay Co. vs. Savings Society, 104 U. S., 579.
Block vs. Commissioners, 99 U. S., 686.
Lyons vs. Munson, 99 U. S., 684.
Orleans vs. Platt, 99 U. S., 676.
Lynde vs. The County, 16 Wall., 6.
Town of Weyauwega vs. Ayling, 99 U. S., 112.
Supervisors vs. Galbraith, 99 U. S., 214.
Wilson vs. Salamanca Township, 99 U. S., 499.
Commissioners of Douglas Co. vs. Bolles, 94 U. S., 104.

Of course, the whole of these bonds are either held valid or avoided upon elementary principles, and we, therefore, deem it necessary to merely state our position in support of their validity, and reserve further argument to be made in answer to the positions of plaintiff in error.

ANSWERS TO POSITIONS OF PLAINTIFF IN ERROR.

The argument of plaintiff in error in this case proceeds primarily upon the ground that these bonds were fraudulently issued, and, therefore, the court will seek sedulously and ingeniously to disregard the rights of the holder. The policy of the law in this behalf does not proceed upon that theory, but upon a broader principle of justice. It protects the honest holder of commercial paper which municipalities may under certain circumstances emit like private persons, where the facts relating to the issuing of this commercial paper are unknown to him, provided by coincident assurances and averments

in writing he is precluded from inquiry or his doubts set at rest. In so doing, it protects the municipality, if not in that instance, at least in the future, by upholding credit and compelling the choice of honest agents. Take this case, for example: if there is a conspiracy to defraud here, it is not confined alone to the handful of adventurers that went into the County of Comanche and secured its organization. It is a conspiracy in which the whole State has engaged and has actively aided and abetted. If the contention of plaintiff in error shall be upheld, it will not reflect discredit upon Comanche County alone, but will involve the honor of the State of Kansas. Could this fraud have been committed if the authorities of the State had not been guilty, either of active connivance, or of a negligence so gross as to amount to such? The Governor of the State of Kansas appoints his own agent to go within the limits of that county and to take the census of the county under the law. His own agent reports to him, and facts are found to exist upon the faith of which he proclaims the organization and existence of the county in the month of August, 1873, and appoints officers to institute and carry on the government of the county. An election for a member of the Legislature is certified to the Secretary of State who places it upon file, issues such member a certificate of election and certifies the fact of such election to the House of Representatives when assembled. The House of Representatives recognizes the member from that county, swears him in as a constituent member of the Legislature of the State of Kansas, and he participates in the enactment of laws for the State of Kansas, and in the election of a United States Senator. The House of Representatives of the Legislature of the State of Kansas institutes an investigation into the organization of this county and ends by finding, substantially, that the county is regularly organized, and by voting down a resolution to exclude this member from the Legislature. He sits through to

the end. During this session of the Legislature, a law is enacted providing for the holding of courts in Comanche County, thereby recognizing it as an existent corporation and validating the organization made by the Governor. Subsequently, those admitted to be acting as the *de facto* officers, at least, of this county executed and issued certain municipal bonds ostensibly for certain lawful purposes, and recited a compliance with law. These bonds are submitted to the Auditor of State, an officer whose duty it is to investigate whether such bonds have been regularly and legally issued, and whether the signatures thereto are genuine, and he finds and certifies that they have been regularly and legally issued, and that the signatures of the officers signing the same are genuine, and he signs the same and affixes the seal of his office thereto. Here is a conspiracy, forsooth, involving the Governor, the Auditor, the Secretary of State and the Legislature of the State of Kansas, to say nothing of the honor and good name of the State. If anything more than this were requisite to lull suspicion, avert inquiry and content an honest purchaser that he was receiving an honest obligation of a municipality of a great State, and thereby to induce him to part with his money with a perfect sense of security, we do not know what it is.

The conclusiveness of all official acts operating as an estoppel goes upon this ground, and this ground alone, that they serve to delude and deceive an innocent purchaser to his injury, and common justice will not, therefore, permit a contrary state of facts to be shown.

An effort is made to apply the doctrine of *McClure vs. Oxford Township*, 94 U. S., 429, to this case, namely: that the purchaser of bonds, while protected by the recitals contained in them, is none the less bound by such recitals and is conclusively presumed to know either the facts therein asserted or such other facts relating to the authority of the municipality to issue the bonds with

respect to which the recitals themselves put him upon inquiry. For the life of us, we cannot see how this has any bearing upon this case. An attempt is made — with what ingenuity the court must judge — to extend this doctrine indefinitely, namely: that he must know not only the facts which the recitals contain, but all the facts which the recitals do not contain, but which by fair intendment they conclude. That, for example, he is bound to know whether he is dealing with a valid corporation. That he is conclusively presumed to look beyond the recitals upon the bonds; to look beyond the proclamation of the Governor organizing the county, and casting his eyes over the intervening ocean, mountains and vast stretch of prairie land see how populous, how well built or the contrary the county may be, and even to see these conspirators at their work.

What, if the holder of these bonds had determined to investigate the validity of the organization of this county, would he have found? If he had sent to the Governor's office for a transcript of the proceedings relating to the organization of the county, he would have found them in all respects regular and the county containing a respectable number of inhabitants. He would have found that the county was recognized by the Legislature and by various State officers. We do not suppose it will be contended that the purchaser of such bonds was bound to visit the county seat and examine the records, for if this be so, the recitals upon the bonds would be valueless to protect him.

We have shown that an organization began by the appointment of officers by the Governor in August, 1873. If we were to indulge in presumption or surmise, then the presumption is that that organization continued and was the organization that was recognized by the Legislature.

The fallacy involved in applying the rule in *McClure vs. Oxford Township* to a case like this is that in the case

of *McClure vs. Oxford Township*, the recitals referred to a law which, taken in connection with the date of issuing the bonds, was absolute notice to the holder that the bonds were issued without authority. There is nothing in the recitals of these bonds that would even excite suspicion, but everything to allay doubt and to make inquiry seemingly unnecessary. How absurd it seems to say that if the Governor and the Legislature and the State officers of the State of Kansas believed that the County of Comanche was a valid organization—and such belief must be assumed as flowing from the presumption that these officers acted rightly and from right motives—a purchaser in a remote commercial center and beyond seas should, by reason of some occult effluence from the bonds themselves have his suspicions aroused that he was not dealing with a valid corporation!

McClure vs. Oxford Township goes no farther than to establish the *e converso* rule that if a purchaser of bonds is protected by the recitals, he is none the less bound to a knowledge of the facts against his title to which the recitals either directly, or by inevitable inference, point him. That is in no respect this case. Nothing but omniscience could protect a purchaser of bonds if the rule contended for by plaintiff in error be the true one.

Another fallacy in the argument of our learned adversary is that the validating of an organization by a legislative act is *ipso facto* the creating of an organization. The question before the court is, Were there *de facto* officers to issue these bonds? That is admitted by the record. The question before the court is, Was there a valid organization of the county? That is shown by the Governor's proclamation and the appointment of officers to serve, etc., etc., and by the conclusive finding of the court below.

A great deal of ingenuity is displayed in asserting that the law appointing courts in Comanche County could have no retrospective operation. Most assuredly it

could not have a retrospective operation so far as the courts were concerned, but the Comanche County that was recognized by the Legislature of the State of Kansas was the Comanche County that had been organized by the Governor and which sent a member to the Legislature who was sworn in on the first Tuesday of January, 1874. In dealing with the subject of the organization of that county, the House of Representatives referred explicitly to this very organization, and declared it to be in all respects valid and regular. The rule as to retrospective operation of legislative acts has absolutely nothing to do with a case of this sort, and to invoke such a rule involves a manifest absurdity.

The weight of the brief upon the other side is cast upon the subject of the organization of this county, and whether or not the county was disorganized, and whether we are seeking the same corporation in court. We think that the last question is more curious than important, because there is no difference and the name and the boundaries of Comanche County exist to-day exactly the same as they did in August, 1873.

Color is sought to be given to the theory that the county was disorganized by certain legislative acts with reference to it and that it had been reorganized in 1885. We have seen that the contention upon the ground of necessity for reorganization has no force in the case of Harper County, for in the Harper County case, there were neither officers nor inhabitants for a long period of years. The case was identical in every respect with that of Comanche County. These later inhabitants of Harper County went on and elected county officers and did all that was necessary to do to readjust and rehabilitate the county government and are to-day carrying on their government under an organization shown and admitted to be originally fraudulent. They sought in vain to shuffle off and get rid of their original fraudulent organization, but were told by the Supreme Court that

that organization was still a valid and subsisting one by reason of the legislative recognition.

The acts claimed to amount to a disorganization of Comanche County are recited in the brief of plaintiff in error, and are merely acts attaching Comanche County to another for judicial and other purposes, *as if* an unorganized county. The counsel then goes on in his brief to argue seriously that which we do not seriously combat, or indeed all: that the Legislature has power to disorganize a county. We do deny, however, that the Legislature may disorganize a county by merely referring to it in an act as a disorganized county, or treating it, so far as legislation concerning it goes, as if it were not organized or had never been. The very case he cities, namely, the case of *State vs. Yoxall*, 19 Pac. Rep., 723, is a sufficient answer to his contention that the acts referred to concerning Comanche County amount to a disorganization of that county. The act referred to in the Yoxall case amounts to a legislative interpretation and limitation of their power in this behalf. It is equivalent to saying that the Legislature of the State of Kansas when it means to disorganize a county passes an act for that purpose, settles the procedure and makes proper provision for its obligations.

The doctrine in the case of *State vs. Commissioners of Pawnee County*, 12 Kan., 426, and *State vs. Stevens*, 21 Kan., 210, is by the court in this case once more reaffirmed, and this case is in point in support of the contention that a valid organization existed in 1875, in Wallace County, by the legislative recognition, in spite of the fact that the inception of the organization of the County was fraudulent.

But an act was passed in 1879 avowedly for the purpose, as declared in it, to disorganize the County of Wallace, and it was declared in that act that the county organization of the County of Wallace, in the State of Kansas, be, and the same is hereby declared null and

void, and said county organization is hereby vacated and set aside.

If the legislative purpose had been to disorganize Comanche County, it is fair to presume that an act of this character would have been passed, because the status of Comanche County was known to the Legislature. Merely dealing with it as an unorganized county by affixing it to another county for judicial purposes is not in itself a disorganization of the county. It is simply making a provision for bringing unoccupied territory in which the organization is suspended under the jurisdiction of the law. *Non constat* if inhabitants were to come in they might not form a county government as was done in Harper County, elect officers and proceed with full powers so far as legislative organization was concerned.

But there is another reason why the County of Comanche could not be disorganized by the Legislature in the manner suggested by the learned counsel upon the other side. Suppose, as we contend, the first organization of Comanche County was unquestionably valid and in good faith in all respects; suppose the county thus organized had created obligations of this character which rest for their security upon both the territory and the inhabitants. If the county could be disorganized by the Legislature's merely dealing with it as an unorganized county, or as one which never had been organized, by attaching it to another county for judicial purposes, then as to these obligations, such act of the Legislature would be unconstitutional and void. Or, to put it in another form, if the Legislature of the State of Kansas were to disorganize — as it might do — one of the most populous counties in the State, and the county should not see fit to reorganize, can it be contended that the last officers of the corporation so disorganized could not be served with process and the corporation itself brought into court and made to answer to its debts? The Legislature can do

nothing which shall tend to impar the obligation of a contract, and the Legislature, according to our view, has done nothing here. The fact that they may have referred to this county in some legislative act as "the unorganized County of Comanche," does not strengthen the case, for such a misnomer cannot be dignified as a legislative act involving a legislative purpose.

The rule of validation rests upon entirely different grounds from the rule of disorganization. Organization brings something into being which cannot be dispensed with or obliterated without an affirmative legislative act. A defective organization may be made good by legislative validation, but the converse of this proposition is not to be found in legislative acts and references merely assuming that organization does not exist, and the Legislature has, in dealing with the Wallace County case, so determined as to the measure of its power.

The attempted reorganization, therefore, as we have said, did not proceed from any necessity in the case, but was done advisedly by those who went into the county with full knowledge of the existence of these bonds and attempted to shuffle off and evade this obligation.

An argument is sought to be made, however, that a certain board of county commissioners purport to have issued these bonds of which board of county commissioners the plaintiffs in error are not the successor in office, but are the board of county commissioners under an independent organization. The board of county commissioners are not before the court as such, but simply by reason of a provision of the statutes, being section 5 of article 1 of chapter 25 of the act relating to counties and county officers, which is as follows:

"Section 5. In all suits or proceedings by or against a county the name in which the county shall sue or be sued shall be 'The Board of County Commissioners of the County of ———,' but this provision shall not prevent county officers who are authorized by law from

suing in their name of office for the benefit of the county."

The defendant in the suit begun below is the "County of Comanche," sued in the name of the board merely because the board is charged with the duty of defending for the county. They are not sued as the official successor of the first board. It is the County of Comanche which is in Court, and the County of Comanche which responds to this action.

Section 1 of the same article makes this clear. The corporate entity does not reside in the board of county commissioners. Section 1 reads as follows:

"That each organized county within this State shall be a body corporate and politic, and as such shall be empowered for the following purposes: To sue and be sued; to purchase and hold real and personal estate for the use of the county, and lands sold for taxes as provided by law; to sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interest of the inhabitants; to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate or administrative powers, and to exercise such other nd further powers, as may be specially conferred by law."

Section 3 reads: "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners."

To say that the board of county commissioners is a "corporate entity" is to say that a board of directors is a corporation. The bonds we hold assert upon their face that they were issued by the board of county commissioners of the County of Comanche, and that fact is supported by the signature of the one who is admitted to be the acting and *de facto* chairman of such board, and attested by the one admitted to be the *de facto* clerk of that county, and impressed by a seal which is admitted to be in possession of these officers at a place called Smallwood, the *de facto* county seat of that county.

The courts in this country have upheld bonds for the issue of which no order was ever made by the board of county commissioners, but to which were appended the signatures and attestation of the officers entrusted with the execution of such paper. In issuing such paper, however, such officers do not issue the paper of the board of county commissioners, but the obligation of the county for which they act.

We give attention to the rather strained arguments here alluded to, contained in the third clause of the brief of plaintiff in error, simply to avoid any misleading of the Court upon the theory that there exists a statute that the board of county commissioners of a county in Kansas are themselves the corporation. They are merely officials like a board of directors or trustees, and the county is the corporation.

The Court is cited to the case of *Berkley vs. Levee Commissioners*, 93 U. S., 238, as furnishing a rule for this case. We cannot see any similarity between that case and this. There the Legislature of Louisiana divided a levee district, which was merely a *quasi* corporation created to carry on a particular work, but it left the old board in existence, and especially continued it for the special object of settling up its indebtedness and the like. No direct legislation of this character has been attempted here. There the question was as to the existence of an official board which had been superseded, and as to its right to perform certain functions which functions had been expressly devolved upon another *quasi* corporation of similar character; that was a mandamus proceeding to compel certain officers to act, but it will be observed that no attempt was made by the Legislature of Louisiana to pass such a law in derogation of vested rights created by obligations incurred by such superseded board.

In this case, as we have before stated, the territorial boundaries of Comanche County as at first created by

the Legislature have never been changed, its name altered or any direct attempt made to disorganize it.

We will now refer, briefly, to the objections which plaintiff in error strives laboriously to make to the bonds themselves in the matter of form and conclusiveness.

It is contended by the plaintiff in error that the bonds, by reason of inherent defects, are open to proof of actual fact as to their issue, and are, therefore, void, and his first point is that by reason of the fact that the copy of bond introduced shows that the same is made payable to "———, or bearer," it is put beyond the protection of the law merchant. He cites in support of this doctrine certain English cases, which, if we read them aright, do not, as to instruments of this character, hold any such thing. His inability to find an American case, and particularly a case of this Court, holding such proposition, is pretty conclusive evidence that there is nothing in it. About seven out of nine of all bonds that are issued are made payable to bearer simply. The board of county commissioners knew when they were executing this instrument that they were making one which would be passed by delivery merely, and the purchaser knew he was buying an instrument that could be passed by delivery merely. If a name had been inserted in the bond, it would not put him upon inquiry of the fact that this merely nominal payee, who might substitute his office boy to be the recipient of the contents of the bonds, was originally entitled to receive them, or paid any consideration for them.

The English cases to which allusions have been made by plaintiff in error, have been overruled by subsequent decisions of the English Courts, and a decision upon the point has been made by this Court in the case of *White vs. Vermont and Mass. Rly. Co.*, 21 How., 575, overruling in express terms the English authorities cited by the plaintiff in error.

The doctrine in the case of *Dixon vs. Field*, 111 U. S., 93, is quoted by counsel for plaintiff in error and asserted to be applicable to this case. With that doctrine we have certainly no quarrel, as it involves a very just, clear and obvious principle of law. The case of *Dixon vs. Field* involves two points only, so far as our judgment goes, in no wise inconsistent, but, on the contrary, in complete harmony with the rules of this Court in relation to bonds, namely: That if a certain fact is essential to the validity of a bond, the recital of an officer not charged with the determining of this fact, will not protect the holder. Second, That if the validity of the bond depends upon the actual existence of a requisite fact as shown by a record outside of the bond, and not upon its ascertainment and determination by anyone, then the record and not the recital of a conclusion from the record must govern and protect the purchaser, if at all. Neither of these principles is applicable to this case. For example, the essential substantive fact to sustain the authority of said officers to issue the bonds is an election at which the electors shall in a requisite number authorize and direct the issue of the bonds, but will it be contended for a moment that if the bonds recite an election favorable to their issue, that the purchaser in good faith could not rely upon that recital, even though the records show that no such election was held, or that if held, a majority had voted against the bonds? Certainly an election under the laws of Kansas can only be evidenced by a record, and in principle we can see no difference—certainly there is no ethical difference—between the enforcement because of recitals of a bond against a municipality which was issued absolutely without the authority of an election, for example, and the bonds in question in this case; for it makes no difference how shadowy was the corporate entity, if there was a corporate entity recognized by law, and it makes no difference what was the nature and

ingredients of a fraud so the fraud existed. If recitals validate that which would be otherwise illegal, no exception to the rule can be predicated upon varying degrees of wrong and turpitude.

It is, after all, not a question of hardship merely, not a question of wrong alone, but a question of law, upon whom such hardship shall be imposed and who shall suffer such wrong.

The purchaser of this bond was not pointed to a record; he was pointed to a law, and the instruments in his hands recited that that law had been faithfully and honestly pursued.

The doctrine in *National Bank vs. Porter Township*, 110 U. S., 608, and *Buchanan vs. Litchfield*, 102 U. S., 278, in no respect overthrows this contention. The exceptions therein stated are just and fair exceptions, and the general purport of those decisions support our argument. In the case of *Buchanan vs. Litchfield*, for example, the bonds recited that they were issued under the authority of a certain act of the Legislature and in pursuance of an ordinance of a city, thereby essentially differing in that respect from the bonds involved in the suit of *Town of Colma vs. Eaves*, wherein the recital was exactly similar to the recital in the bonds under consideration, viz., that the bonds were issued "in accordance with and pursuance of" the legislative act. So those cases cannot be drawn in precedent in this case at all.

The attempted inference to be drawn and the application to be made from these decisions in plaintiff in error's brief is, we think, sufficiently answered by the opinion of the Court appearing in the record, to which we hereby make reference and the authorities therein cited.

A specific answer might be made, however, if one were deemed necessary, to the contention of the plaintiff in error that we are charged with notice of the fact that

two-fifths of the voters at the last general election had not petitioned, by reason of the fact that no general election could possibly have been held in that county for that year, and further, the fact that a requisite petition had been filed could not, therefore, in the nature of things, be found by the board. That answer would be this: An unrepealed statute stands to-day upon the statute books of Kansas authorizing the issue of bonds of the character of both those issues and upon a simple majority vote of the people, at an election called upon the petition of fifty voters. (See chapter 52, Laws 1868, *ubi supra*).

Under such law, the facs supporting the exercise of authority may and must of necessity be conclusively found by the board of county commissioners issuing the bonds, and the knowledge of no jurisdictional fact predicated upon any record which may, or may not be in existence, outside of the control or determination of the board is or can be imputed to the purchaser of such bonds.

We think we have adequately answered in our opening argument the shadowy figment of an argument made by plaintiff in error against the bridge bonds. An effort is made, however, to show that the recital as to the court-house bonds is ambiguous, and the decision of the Court in the case of *School District vs. Stone*, 106 U. S., 183, is cited. Again there is no parallel. The recital in the Stone case was that the bond was issued in pursuance of an election held in conformity to a certain act. The plain import of the recital was confined to the validity of the election, and did not conclude any other prerequisite requirement or authority. The Court simply held what it was bound to hold, and which it also held in *McClure vs. Oxford Township*, that if the recitals in bonds protect the holder when clear and comprehensive, they fail to protect him when deficient and ambiguous.

An effort is made by something of the same kind of

logic-chopping as was involved in that ancient bit of metaphysics whereby a horse chestnut was transmuted into a chestnut horse, to support the charge of ambiguity against these recitals. The evident labor given to the effort is in itself a proof of its want of success.

Subsequent to the transactions involved in this suit, the Legislature amended the law with reference to the organization of new counties, and put into the law so amended a provision prohibiting counties which had been organized for but one year from issuing bonds. This was a legislative acknowledgment of the fact that these and like bonds had been issued in newly-organized counties, and was an attempt upon the part of the Legislature, recognizing the fact that such bonds had been issued and gotten into circulation, to close the stable door after the horse was stolen. If such provision had been in the law as it existed at the date of the organization of this county, or at the date of issuing these bonds, the attention of the purchaser of such bonds would have been necessarily called to the fact of the date of the organization of the county and its length of continuance.

But, by way of illustration, let us suppose that the bonds of Comanche County were issued under the law as it exists with this clear prohibition in it. Say the county had been organized as a valid corporation and had been in existence for a year, and that then by reason of a failure of crops, or a threatened Indian foray from the Territory, or for any other reason, history in Kansas should repeat itself once more and the county be almost depopulated, the Legislature would make no attempt to disorganize it; then suppose the few who remained got together, elected themselves to office, carried on a *de facto* organization, sent a member to the Legislature, procured laws to be passed for their benefit, and issued bonds, as in this instance, with cast-iron recitals upon them, and put them upon the markets of the world:

Would or would not the territory included within the organized county be liable for this debt? If the extreme view taken by our adversary be true, then simply because these conspirators divided the avails of these bonds among themselves, and they were not put to the public uses recited in the bonds, an innocent holder who had—as this plaintiff testifies he did in this case—paid ninety-five cents on the dollar for them, would be absolutely remediless because he had not visited the county whose paper he bought, investigated its physical and financial resources, and taken a census of its population. This is not the law, and we humbly submit that such rule sought to be established in this case, is neither right nor just; it is neither tenable as a principle of jurisprudence, nor sound as one of morals.

The court below, entirely familiar with all this history—the judge deciding it having been a citizen of the State from its territorial days—took our view of this case. We cannot believe that in the light of the numerous and consistent rulings of this Court upon identical questions any different view can be taken. Certainly, if we are mistaken it is because we are incapable of reading aright the plain decisions of this Court.

The questions, as we have said, are few and elementary, and we have been only tempted into extended discussion of them by the portentous length and wide scope of the argument filed by opposing counsel.

We believe the judgment of the court below should be affirmed, and therefore, confidently submit the case to the decision of this tribunal.

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